

**THE BURDEN THAT NEEDLESS REGULATIONS AND
LACK OF COMMON SENSE IN ENFORCEMENT OF
REGULATIONS PLACE UPON SMALL BUSINESS**

HEARING
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SUBCOMMITTEE ON
GOVERNMENT PROGRAMS AND OVERSIGHT
OF THE
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HOUSE OF REPRESENTATIVES

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TUESDAY, JULY 27, 1999

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT PROGRAMS
AND OVERSIGHT,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2360, Rayburn House Office Building, Hon. Roscoe G. Bartlett (chairman of the subcommittee) presiding.

Chairman BARTLETT. Let me call our Subcommittee on Government Programs and Oversight to order. Good morning and welcome to this hearing of the Subcommittee on Government Programs and Oversight of the Committee on Small Business. A special welcome to those who have come some distance to participate and to attend this hearing.

An important focus of this hearing is the unnecessary burden placed upon small businesses by needless regulations and lack of common sense in enforcement of regulations. In previous hearings, small businesses from various parts of this nation testified to the problems that federal regulations caused them.

This hearing again provides a national forum for small businesses to express their views on whether present federal regulatory programs are stimulating or deterring job growth and economic development.

Another and equally important focus of the hearing is the fairness with which regulations are enforced by Federal and State entities. Have regulatory agencies in the enforcement of regulations lost sight of the need to be fair and to use common sense? Is there a double standard applied in the enforcement of regulations when the violation is caused by government itself?

In the course of the hearing the Subcommittee will view and take testimony concerning the lower step on the East front of the Capitol which is in violation of code requirements. If this same condition existed with respect to a small business, the regulatory agency would have required the small business, at great expense, to correct the situation.

However, since it is the House of Representatives that is in violation, no enforcement action has been initiated. Selective enforce-

ment such as this graphically illustrates the disproportionate regulatory burden that small businesses are required to bear.

Mayor Jay Gullo of New Windsor, Maryland, our first witness, who is also the owner of a small business, will tell you of his experience with building a wheelchair ramp that was found to be a fraction of an inch too short.

As a former home builder, I was shocked at how grossly out of code the House Capitol step is. Unfortunately, my experience and those of most small businesses will show the fact that a reasonable explanation for the discrepancy wouldn't be acceptable if this wasn't the U.S. Capitol building.

My reason for pointing out the code violation with respect to the Capitol step is not to have the step replaced at great expense, but for the purpose of bringing reason and fairness to the regulatory process.

I am most appreciative that you have taken time from your busy schedules to participate in this hearing. We look forward to a lively discussion. Thank you again for being here.

As testimony to the importance of this hearing, one of the associations that we invited to come, in spite of a plethora of horror stories, was unable to find a member who was willing to come, fearing recriminations from the regulatory agencies.

This is perhaps the best testimony this morning; that we need this hearing and we need changes in the attitude of the regulatory agencies.

[Mr. Bartlett's statement may be found in the appendix.]

Chairman BARTLETT. Let me turn now to our ranking member, Mr. Davis, and ask him if he has comments or an opening statement this morning.

Mr. DAVIS of Illinois. Thank you very much, Mr. Chairman, and let me first of all thank you for holding this hearing. I think it is essential that we look at government and its operation from every vantage point and from every angle with the idea of trying to make sure that it is as user-friendly as possible and to make sure that it provides for the citizens the greatest amount of service and opportunity.

And so Mr. Chairman, I welcome the opportunity to hear testimony from our distinguished panel of witnesses. The debate on the program of complying with regulations and dealing with regulators is always a major topic of conversation.

But first, the paperwork burden of the Internal Revenue Service was the primary concern because preparing a regular payroll is a constant reminder of the numerous rules and regulations dealing with tax withholding and reporting.

But businesses' concerns are not limited solely to paperwork issues. Small business owners often fear that they will inadvertently fail to comply with some obscure rule and that a government inspector will show up, close down the business, and drive them into bankruptcy.

That is why we are here today to take a look at these obscure rules and their application. I am sure that many of this panel believe with some justification that the government is more interested in obtaining penalties than in promoting compliance with the law.

Although I disagree with that, I do believe that we should take a valid look at those regulations that lack common sense to create proper legislation which contain language to address these issues and situations.

Again, I join you in welcoming the distinguished panel of witnesses and look forward to their testimony. And again, I thank you, Mr. Chairman, for holding the hearing.

Chairman BARTLETT. Thank you very much. And Mr. Hill is also with us. Mr. Hill do you have an opening statement or comments? Okay, thank you very much.

Let me ask now if the witnesses will take their place at the table? One of our witnesses is coming but he is handicapped and it may be a few minutes before he gets here, but we know that he is on his way.

Our witnesses this morning are Honorable Jay Gullo, Mayor of New Windsor. I would especially like to welcome Jay. He is a friend, a Mayor in the Congressional District that I have the great honor of representing. Welcome to our hearing this morning.

Michael Rose will be joining us shortly from the National Association of Homebuilders. Mr. Ken Boehm, Chairman of the National Legal and Policy Center. I read your testimony with great interest, sir.

The Legal Services Corporation, which is a major feature of your testimony, was instrumental in closing a whole series of businesses in our District. There is now no orchard industry in Western Maryland thanks to the Legal Services Corporation.

And I will say sir, that in the past we have tried to get orchardists from Western Maryland to come and testify here. That has been very difficult because they fear recriminations from Legal Services Corporation. This shouldn't be the attitude of our citizens and so I look forward to your testimony.

And Mr. Alan Hantman, the Architect of the Capitol, thank you very much for also joining us, sir. And we will turn now to Mayor Gullo for his testimony.

STATEMENT OF JAY GULLO, MAYOR, NEW WINDSOR, MD

Mr. GULLO. Thank you, Mr. Chairman and members of the Committee. It is a pleasure to be here and testify before you. What I am going to tell you about are some of the experiences that I have had as the Mayor of a small town in rural Maryland, and also as a small business owner. I do not represent that I have any special knowledge of regulations or the enforcement of regulations, but I do have some interesting experiences where those regulations had an impact on me and my community.

I also want to make it clear that while I will be talking primarily about the Americans With Disabilities Act, I do not disagree with the overall goal of the Act and the overall purposes of the Act. I think it has a noble goal and I think it has a worthy place in our society.

However, what I always find fault with is the enforcement of the regulations. We seem to lose something in the enforcement. The spirit is carried out at the legislative process but when you actually get the Executive to enforce it, it doesn't really carry the message to the people.

The first example I would like to cite is one of the successes we have had. A small business and a small town have a lot of things in common. They don't have a lot of room and a lot of capital to spare, and our small town has about 1,400 people. We have a budget of about \$270,000.

Our Town Hall where we meet and carry on our meetings is a 2-story building that was built in about the 1900's. We meet in the meeting room which is on the second floor, and obviously at the advent of the ADA law that was not able to accommodate the requirements.

And obviously, one of the most important things about government and public meetings is having people attend and freely being able to attend. So what was suggested to us by the inspectors that were coming around to make us comply was that we install an elevator.

Now mind you, the second floor is just one big room. It would be an elevator to one room of this building and the cost of the elevator was going to be about \$100,000, so a little less than half of our entire year's budget would be spent on this elevator.

And that is the only solution that we really were given. And what we decided was that we couldn't justify spending that money yet we did not want to be out of compliance, so we made a deal with the Fire Company—it was next door to us—and said, can we use your Social Hall?

We want to have our meetings there once a month and what we have to do is set up the chairs and set up the tables and take them down. We saved \$100,000, we complied with the law, by using a little bit of common sense.

That was my last victory in using common sense in government; the two other examples I want to cite where I am not so victorious in.

The second one has to do with the local pizza parlor in our community, and if you realize, our community is about 175 years old. We have a lot of old buildings, small streets, narrow sidewalks, and as all over the country, we want to renovate our main streets. We want to revitalize downtown and revitalizing downtown means putting businesses into these old buildings.

So when this pizza parlor was about to open up they had to go through the process of upgrading the plumbing and the electric and things like that, and the Americans With Disabilities Act had to be addressed as well.

Being on the corner and having no rear entrance to the building, only the front entrance, there was the question of, how are we going to build a wheelchair ramp into this building to make it accessible?

And after looking at it several different ways it was discovered that the length of the ramp and the width of the ramp would just not be able to be built because it would block not only the view of the traffic at the corner, but it would also block pedestrian traffic on the street.

So a waiver was obtained and they did not have to build the wheelchair ramp. However, when they went through their plumbing inspection the ADA parts came into that as well and they were told that, although they have no wheelchair ramp they would have

to build their bathrooms, two bathrooms, fully ADA-compliant so that they would be able to accommodate wheelchairs, despite the fact that wheelchairs would not be able to be in the building.

What this meant was, the owner of the pizza parlor lost a lot of floor space. There were tables that weren't being able to put in because he had to have two fully handicapped-accessible bathrooms; despite the fact that the building was not compliant as you enter.

The most personal example I have and the one I think is particularly relevant today, deals with accessibility into my law office. After graduating law school I decided to renovate an old carriage house in my home town. It was actually my grandfather's barber shop. Again, we had to update it with the water, the electric and things like that, and one of the things that had to be done was a handicapped-accessible ramp.

And the office is situated—it's basically six inches above the street. There is a 6-inch curb and gutter that had to be addressed. And so what we did was, we made on the plans that were submitted to the County—in this situation the County is the regulatory agency that carries out the ADA law.

They approved the plans and they were drawn to scale. But when we were done and we built this ramp—it was 6-foot ramp, supposedly. The curb was 6 inches and the rule for the Committee is, you can have one foot of fall for every inch, so a 6-inch curb would have to have a 6-foot ramp.

When we laid the ramp and the inspector came out to see if it was in compliance, they measured the ramp and they found the ramp was 5 feet 11³/₄ inches—so one-quarter inch off of the 6-foot mark—and immediately said that this was not in compliance and would have to be torn out and done over.

Well, we had serious misgivings about the time, about the expense of doing this. The contractor was in the middle of this whole argument as well, saying that they built it and it was substantially into compliance; that the difference was de minimis; that the spirit of what was going on—the grade of the ramp—was really what the law dictated.

We had an inspector that did not want to yield. He said that if we did not like his decision we could take him to court. Well, basically we had to become experts on the ADA law; at least as relevant to our ramp. And it took us a month to get the necessary information. It took us a month of deciding, and eventually we decided it was far cheaper and far quicker to tear the ramp up and put a new one in.

So we spent about a thousand dollars to do that, a month of lost time—because at this point in time I did not have a use and occupancy permit so I could not practice law out of the building—and in the end of it we tore the ramp up, the jackhammers came in, and we recreated the ramp to be a quarter-inch longer.

And that was basically my introduction into common sense, or lack thereof, in government. As I said in the beginning, I felt that the purposes were being accomplished but sometimes the black and white of the law is not exactly what we need to follow. We need people out there that have some discretion and have some common sense in enforcing what goes on.

And we try to apply that in our town government every day and we only hope that others we deal with will do the same. Thank you.

[Mr. Gullo's statement may be found in the appendix.]

Chairman BARTLETT. Thank you very much. We will have opportunity a little later when we go out to the Capitol steps to contrast your experience with the wheelchair ramp, one-quarter inch in length, with the situation at the Capitol steps.

Mr. Rose, we are happy that you are here. Do you need a few moments to organize yourself or are you okay to proceed?

Mr. ROSE. I am fine.

Chairman BARTLETT. You are okay, good. We have already introduced you and we are happy that you are here, and proceed as you wish.

STATEMENT OF MICHAEL T. ROSE, NATIONAL ASSOCIATION OF HOMEBUILDERS

Mr. ROSE. Good morning, Mr. Chairman. Thank you very much for giving me a couple of seconds to pull myself together.

My name is Michael T. Rose. I am a home builder and developer in the great state of Maryland, and previously I served as President of the Maryland Capital Building Industry Association, or those of us from Maryland know it used to be SMBIA.

I am a member of the Board of Directors of the National Organization on Disabilities and in the past I have served as Chairman of the President's Advisory Committee on Housing for the Elderly and Handicapped for the U.S. Department of Housing and Urban Development, HUD. I thank you for the opportunity to come and talk to you today on federal regulations that are impacting the home building industry.

NAHB and its 197,000 member firms and eight million employees have long believed that every American should have the opportunity to a decent home, as part of the American dream. Providing this opportunity is a challenge that home builders accept because we care about housing, we care about the communities we live in, and we care about our families.

But we happen to be one of the most heavily regulated groups in the nation. Builders know all too well that burdensome regulations and excessive enforcement policies serve only as barriers to affordable housing.

Today, on behalf of NAHB, I would like to discuss three regulatory issues that have contributed to the increase in housing costs, making housing less affordable for thousands of American families: Fair Housing Accessibility, Low-Income Housing Tax Credit Audits, and Essential Fish Habitat.

First, I would like to talk about fair housing for a brief minute. In 1988, Congress enacted the Fair Housing Amendments Act to include "family status" and "disability" as protected classes under the federal Fair Housing Act.

NAHB supported the amendments believing that affordable housing should be accessible to every American. And at the time, the cost of compliance was expected to be minimal. In fact, Senator Tom Harkin in his floor speech referred to the Fair Housing

Amendment Act stating, and I quote, "the bill only includes minimal low-cost or no-cost features of adaptive design."

Senator Ted Kennedy said that it would cost "twenty-seven dollars for studs in the bathroom, accessible light switches, and widened doorways," which the Senator called "absolutely minimum requirements".

In reality, this has not been the case, and let me tell you why. When the 1988 amendments were enacted, there was little attention devoted to how the new disability requirements would be implemented. In 1988, we were expecting to get guidelines published immediately.

When the guidelines weren't published in 1989, the Home Builders Association and the disability groups formed a coalition and published a book that I have in my hand here, that provided guidelines and information, at the same time keeping housing affordable.

It was to determine which is a bigger barrier to affordable housing: a \$300 a month rent increase to any American, or a 6-inch curb? This book had a lot of time and a lot of effort put into it. It was submitted to HUD. Unfortunately, HUD rejected the recommendations from the various disability groups which included the American Paralysis Association, and the National Organization on Disabilities.

At that time, Mr. Chairman, I represented the disability groups dealing with the home builders, since they felt that I would be the most knowledgeable one to understand the codes and the different issues.

The cost now ranges from \$1000 to \$3000 per unit, and sometimes can go as high as \$12,000. But the issue here is that these guidelines have not been distributed so many builders across the country are in the dark.

As a result, there is no clear guideline on how to build units that comply with the law. And HUD does not have the authority to approve any building plans that are submitted by builders.

In 1991, HUD issued its fair guidelines. In 1996, it issued the manual and, in fact, in the front page of its manual, there was a total disclaimer that said that if you follow this you are still wrong and it is not guaranteed that it is right, because HUD still didn't quite understand what it is. HUD has now published another manual two or three years later, and we are up to 1999.

Mr. Chairman, it is necessary to understand that builders rely on building codes. They rely on local building and land development codes to determine the requirements to follow in order to develop land and put up single-family homes or apartment buildings.

When a builder receives a local building permit, he or she thinks that the building plan complies with all the necessary requirements. Imagine the surprise years after-the-fact, when he or she finds out that the building is not in compliance with federal law; specifically the Fair Housing Act.

This is what has happened to builders from Idaho to North Carolina. They are being hit with actions from government agencies and private fair housing enforcement groups claiming that the buildings were not built in compliance with federal accessibility require-

ments, even if these builders have done everything they believe they need to do to comply.

And believe it or not, these private enforcement groups are receiving federal funding from HUD to bring such actions against the builders. In some cases, these groups, such as the one in Idaho, do not even have a disabled person among them. They simply get paid for finding buildings that are not in compliance with the law.

In fact, in fiscal year 1999, the Fair Housing Initiatives Program, which literally funds organizations to "crack down on housing discrimination," received \$15 million: \$10.5 million of which HUD granted for enforcements or bounties, and only \$4.5 million of which was granted for education and outreach.

Again, Mr. Chairman, I have to emphasize that builders want to provide fair housing for every American, but at what cost? As you can see, these costs are tremendous any way you look at it.

Because NAHB believes that Congress did not intend to impose excessive regulations in this area, we would like to work with Congress to develop legislation that would give builders some relief from unreasonable enforcement actions, and we are willing to work with HUD to draft guidelines that make sense.

And because the chances of a builder opening up his or her mailbox and finding a letter from the Justice Department is far greater than finding guidance from HUD on how to comply with federal accessibility requirements, we would like to see HUD direct funds away from enforcement and more toward education, which is woefully inadequate.

And finally, we believe that HUD should provide incentives to State and local governments to adopt the federal requirements into their local building codes.

To resolve these problems, we have been working with members of the House and Senate through various means. First, Representative Walter Jones introduced H.R. 2437 which provides a "safe harbor" for developers and owners for certain buildings built in compliance with the applicable local accessibility requirements.

Also, we are working in conjunction with Congressional Appropriators to re-focus HUD's attention on this issue.

The next issue is Low-Income Housing Tax Credit Audits. Another example of enforcement policies gone awry is the Internal Revenue Service's audits of projects that have been awarded Low-Income Housing Tax Credits by the states. Unfortunately, I can only tell you what is happening in generalities because quite honestly, our builders are afraid to tell their stories for fear that some of their other projects may be audited.

The Low-Income Housing Tax Credit program is the cornerstone of revitalizing our low-income communities. Congress created the program in 1986 to provide a limited amount of tax credits to each State to help finance the building of affordable housing. In order to be awarded the housing tax credits, developers have to submit to an underwriting process by the state allocating agency at three different times.

These three determinations include an assessment of all the sources of financing and the total development costs for the project. This assessment is used by the state to calculate the minimum amount of credits necessary to fill the funding gap to make the

project financially feasible. Once the state agency issues the final amount of tax credits for a project, the developer sells those credits to investors at a discount to raise the necessary equity funds to build the project.

It is similar to the process that you or I go through to get a mortgage loan to buy a home. We submit our credit history, our sources of income, the asking price for the home, etceteras. Once we are approved for the loan, we buy the property, and we move into the house, we start making payments. The last thing we expect is for our bank to come back to us and say, “well, actually, we miscalculated the amount we can loan you. You will now need to come up with additional funds.”

Yet, that is exactly what the IRS is doing in its audits. It is telling developers that the state agency’s allocations of tax credits is incorrect, and that it is going to retroactively recalculate and recapture the tax credits without proving that the housing has not been occupied by low-income residents or that the costs should not have been incurred. And these are funds that go to the Treasury, not back to the housing program for the state to re-allocate.

The IRS does not think that certain portions of the developer and professional fees should be considered “eligible” for tax credit equity financing. Yet, this has not been the practice in the affordable housing industry, and if true, would not produce enough credit equity funds to finance most building projects today.

By excluding portions of developer and professional fees, the IRS is creating instability and uncertainty about tax credit allocations.

But if it is to continue to work, the Low-Income Housing Tax Credit program must have certainty in its determinations. Without reliable allocations, the ability to plan for the development of housing with private financing is undermined. After all, private capital and capital markets are very sensitive to risks and potential risks.

If the threat of an IRS audit and recapture of tax credits is looming over investors’ heads, you can bet that they will either flee the market or lower the price they pay for the credits to cover the increased risks. Either way, it amounts to increased costs for the developer and less affordable housing.

So NAHB would like to work with Congress to develop a legislative proposal that does the following three things: (1) Increase certainty for determining eligibility basis and credit allocations; (2) protect existing credit allocations; and (3) provide finality for future credit allocations.

The next item is Essential Fish Habitat. Finally, Mr. Chairman, I would like to discuss the impact of a new federal regulation, Essential Fish Habitat, that gives the federal government an unprecedented level of control over land use and property zoning decisions.

In 1996, reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act—a law designed primarily to manage and regulate marine fisheries by the Department of Commerce—Congress created an Essential Fish Habitat regulation based on the critical habitat model found in the Endangered Species Act, or ESA. The intent of this new regulation was to “minimize adverse effects on habitat due to fishing.”

However, the National Marine Fisheries Service is interpreting this mandate to extend its reach into non-fishing activities such as:

land development, home construction, forest practices, mining, water supply, and agriculture.

It is proposing something similar to ESA's critical habitat that would cover all fish, including fish that are not endangered or threatened. In fact, the National Marine Fisheries first attempt to map EFH, it defined EFH so broadly that the entire watersheds, more than half of Washington State and more than half of Oregon and more than one-third of California, are covered.

So for example, a builder in Washington who wanted to get a Section 404 wetlands permit from the Corps of Engineers would have to wait for the Corps to consult with the National Marine Fisheries to determine if the project will impact Essential Fish Habitat before getting the permit.

If the National Marine Fisheries believes the project would harm this, it would recommend to the Corps to approve on the condition that the builder modifies the project to include the conservation recommendations.

This includes any development project that requires any federal permit, funding, or approval and is within a designated habitat of essential fish species.

And keep in mind, these are not restrictions for species of endangered extinction. They are restrictions to protect the habitat of all fished species, no matter how abundant.

As you can see, the permit processing timeline would be more lengthy, especially if a builder has to get a biological consultant for the larger projects within Essential Fish Habitat.

If all this sounds familiar, it should. This is exactly how critical habitat is regulated under ESA. Although the EFH has not gone into effect, we can use ESA as our model of what this type of regulation could look like down the road.

Already under ESA, a builder has to jump through any number of hoops to get a permit to develop land. In the Seattle Metropolitan area, for example, the Fish and Wildlife Service listed eight salmon species as endangered, this past spring. This has the potential of shutting down this area.

And I am not talking about home building alone. I am talking about specific activities that will affect the economic well-being of Washington State, such as timber harvesting, commercial fishing, tourism, and any activity that may be related to the critical habitat of these salmon.

Many people have said we should stop eating salmon if they are endangered. I think there is something like 350,000 fish caught a day and the salmon industry is one of our major economic things.

So, in addition to cumbersome ESA or wetlands consultations, a builder would have to endure another, more important, duplicative process. What makes matters worse is that the National Marine Fisheries may not even have the statutory authority to create most of this program. This is excessive regulation.

And what will be the result of longer permitting processes, more stringent reviews, greater prohibitions on where we can develop, and increased mitigation? Higher housing costs, because ultimately, these regulations would require the builder to spend more time and money on complying with a requirement that has already been fulfilled under ESA.

Home builders support reasonable measures to protect natural habitats, Mr. Chairman, but we would like to work with Congress to eliminate the regulation of non-fishing activities under the Magnuson-Stevens Act. Let us bring some balance and plain old common sense back into the picture.

Again, thank you for inviting me to testify before you today. Home builders just want to build homes and provide affordable housing to Americans, but it is definitely becoming harder and harder to do so when excessive regulations and the threat of enforcement actions prevent us from doing so.

NAHB is grateful for your interest in bringing to light some of these issues, Mr. Chairman, and we value the understanding that you, as a former home builder, have of our industry. We look forward to working with you to create a more balanced approach to the federal regulatory and enforcement processes and thank you for the time you have given us today. I am happy to answer any questions that you may have.

[Mr. Rose's statement may be found in the appendix.]

Chairman BARTLETT. Thank you very much for your testimony. In a previous life I was a land developer and home builder and so I listened to your testimony with great interest.

As you can hear by the bells something is happening, and that something is a vote has been called. So let's take a brief recess before we go to our next witness so that we can go to vote. We shall return.

The bells indicate there is only a single vote so within about 15 minutes we should be able to return to continue our hearing. We will stand in recess momentarily.

[Recess.]

Chairman BARTLETT. The Subcommittee will reconvene. Thank you very much for your patience in our voting delay.

Mr. Boehm, Chairman, National Legal and Policy Center, thank you very much for coming and we look forward to your testimony.

**STATEMENT OF KENNETH BOEHM, CHAIRMAN, NATIONAL
LEGAL AND POLICY CENTER**

Mr. BOEHM. Thank you very much, Mr. Chairman. My name is Ken Boehm with the National Legal and Policy Center. We promote open, ethical and accountable government, and we act as a watchdog on government abuses. And in this role we find lots and lots of regulatory abuses that particularly impact small businesses.

Regulatory abuses that I will discuss today are those of the Department of Labor and the Legal Services Corporation; two regulatory bodies that particularly can negatively impact small business owners.

Each of the regulatory abuses I am going to cite not only violate the principles of fairness and common sense, which is one of the common denominators of all of what we are hearing this morning, but they also are directly contrary to the expressed intent of Congress.

The whole theory behind regulations is: Congress passes a law, the regulatory body then puts the law into effect by better defining it with regulations. But what they are not supposed to do above all else is change the clear meaning of the law.

In the first instance, voluntary carpooling by farm workers. This meets the description that Congressman Davis mentioned at the top of the hearing about obscure rules that can absolutely bankrupt a small business operator. When Congress passed the Migrant and Seasonal Worker Protection Act they did it to help laborers. They didn't do it to bankrupt small farm owners and operators.

One of the things that they did was say that if you are a farm employer, if you are a farm contractor, you have certain responsibilities for transporting your labor. But if it is a voluntary carpool, the way lots of workers in this country get to work—even up here when I worked on Capitol Hill much of our staff came in by carpooling—then the reach of the law was beyond that.

In fact, Congress was so intent that voluntary carpools were beyond the reach of this law that in their Committee report when they passed the law they said specifically:

“The Committee intends, however, that voluntary agreements between individual workers for the transportation to and from their place of employment (“carpooling”) for which they receive no fee or other benefit from the employer is not within the scope of this section.”

They were telling the world that if a bunch of workers get together and they carpool and they don't get any money from the farmer and they don't get any money from the labor contractor, the law doesn't reach it.

Well, by the time the Department of Labor finished their regulation interpreting this voluntary carpool exemption, they came up with a rule that in many circumstances, almost guaranteed that the farmer would be held responsible.

Here is what they did. They said, any compensation or valuable consideration—and “any” meaning even de minimis amounts—over the amount of the cost of the transportation, makes that carpooler automatically a farm laborer and by extension, extends the liability to the farmer who is supposed to have some control over the farm laborer.

The net result is, there is a chain reaction of liability with often disastrous legal consequences. Suddenly, if a driver charges not 30 cents but maybe 50 cents a mile to his fellow workers, the driver becomes an unregistered farm labor contractor.

The driver is now transporting workers in violation of federal law and it is likely the vehicle doesn't meet the strict legal safety and insurance standards, including insurance coverage of \$100,000 per seat.

The farmer, who may not even know about this unless he questions each of his workers every day as to how they got there and what the costs were and the rest of it, suddenly is liable, and if there is an accident or something else, that farmer can face devastating—not just legal costs but various statutory penalties.

This is an example where Congress says one thing, voluntary carpools are outside the reach of the law, and by the time the Labor Department gets finished writing their regulation, a tiny infraction by a farm worker who may not and probably isn't knowledgeable to fine points of the Code of Federal Regulations, means that not only is he liable but the farmer is liable. A clear case of a regulation doing the exact opposite of what Congress intended.

The Legal Services Corporation all too often targets small business. They target them for a variety of reasons, not just the fact that there are legitimate complaints of poor people against small business, but many times small business can't afford the legal fees and will fold without a fight because the cost of defending is too high.

One of the examples, and again it involves in many cases, small employers who are farmers, is the alien presence requirement. Congress passed a law and has passed it each year as part of LSC's appropriation, to say they can only represent aliens, non-citizens, if they are present in the United States—they have to be here—and are otherwise eligible.

Legal Services has reinterpreted the phrase, "the alien is present in the United States" to mean, the alien was present in the United States, and has insisted on representing people who haven't been in the country for several years. How you can misinterpret the meaning of the word "is", is difficult to explain, although it has sometimes been a problem in other context.

And right now you have, as we sit here today, farmers in Kentucky, North Carolina, and other states being sued on behalf of people who are residing in Mexico and other places despite the clear intent of Congress that the particular client must be present, is present in the United States, strikes most people as a very common sense requirement.

It, for example, doesn't mean is present in Mexico or Jamaica or some other area. The problem here is that the LSC Board and the LSC management decided that they don't want to enforce this law that Congress has told them to enforce.

And so the President of LSC in March of this year wrote a letter saying that they were not going to enforce this law and this regulation as part of the appropriations law tied to their appropriations against any Legal Service's program because they may have misinterpreted the meaning of the word "is".

So therefore, so much for Congress passing laws telling a program what they can or can't do. The bottom line is, they appointed a special commission, there were no representatives of small business there, there were not representatives of the farm community.

In fact, the 5-person commission was very, very one-sided, held some hearings, and they are about to interpret this regulation in a way that is going to hurt people. And it is going to hurt poor people here in this country because Congress intended the scarce funds to help poor people; even if they are not citizens at least they have to be present in the country.

But because of a misinterpretation of the word "is" to mean "was", you have this entity run by and for lawyers turning logic and Congressional mandate on its head.

Another example: lobbying. Congress said you can't lobby if you're in Legal Services. Legal Services all too often lobbied against small business by promoting taxes, by promoting more regulations, by promoting one-sided and often convoluted consumer legislation that hurts small business.

Congress told them you can only lobby in very limited circumstances: either when you are called to testify or when you have

a client whose very narrow, specific problem can best be solved by this lobbying.

What happened in South Carolina this past year was, a business down there saw Legal Services lobbying on some legislation that would have hurt that business. They complained to the Legal Services Corporation saying, you know, they are lobbying on some legislation that hurts us. We didn't know they could do that.

Legal Services investigates, but not much, and they forget to even check if they even had a client; one of the clear, legal requirements. If you don't have a client what are you lobbying for? You are lobbying for what you as a Legal Services lawyer might want the law to be, but without a client you don't have a case is what Congress has told them, and what their own regulation says.

They dismissed the business' complaint. They said it was not well-founded. They dismissed it. The business then, not to be thwarted, went to a federal Judge down in South Carolina, in a case called *RMC v. Legal Services Corporation*. They asked the federal judge, was this lobbying against the business interests illegal or legal?

The federal Judge looked at it, found that they didn't even have a client, the client they claimed they had never talked to the lawyer who was doing the lobbying and didn't even have a special problem that could be solved by lobbying, so it was wrong on every count.

And the Judge basically threw the book at Legal Services, said that what they were doing was in violation of federal law and Legal Services Corporation had no rational basis for dismissing this valid complaint.

So once again, the common denominator, as with the Department of Labor case, as with the case of the definition of the word "is", and in this case was, Congress passes a law, tells a regulatory body—whether a Department as in Labor or a government-funded agency such as in LSC—you can or can't do a certain thing, or this is the definition we want you to use.

And by the time it comes out the other end the regulation is either misworded or misinterpreted in a way that it violates every kind of common sense, every kind of common usage of common words, and the ultimate victim in all these cases are small business operators who, as everyone in this room knows, very, very frequently don't have a whole lot of money to pay for expensive lawsuits.

And the fact that they have to pay for those lawsuits for a regulatory abuse that violates the intent of Congress, is the worst part of the scenario that is discussed in these three types of violations.

So Mr. Chairman, I commend you and this Subcommittee for having this hearing. Redress of grievances is part of the First Amendment. Small businessmen have real grievances when their very livelihood is threatened by regulatory abuse as it is in these cases.

Thank you, sir.

[Mr. Boehm's statement may be found in the appendix.]

Chairman BARTLETT. Thank you very much. And now Mr. Hantman, who I would like to note was not the architect when the

steps were designed, was not the architect when the steps were built, so he has inherited the steps. Your testimony, sir.

**STATEMENT OF ALAN HANTMAN, AIA, ARCHITECT OF THE
CAPITOL**

Mr. HANTMAN. Thank you, Mr. Chairman. Thank you for inviting my testimony concerning the lowest step of the monumental stairs on the East Front, House Wing of the United States Capitol.

May I start by saying that there are significant differences in how codes deal with new structures and with work on existing structures that are not recognized as historic in nature. Historic structures are usually given more leeway than other structures and I am here today to present my view as to whether the step in question does indeed, constitute a code violation, since it is clearly a historic structure.

I would like to begin with general comments on the application of codes to the work of this agency as it undertakes projects at the direction of the Congress. By law the Congress can of course, impose codes and standards in our work.

No specific building code has been legally applied to our projects in light of the practice of the agency to follow appropriate national codes in the construction, reconstruction, and restoration of the property entrusted to our care. The Congress has, through the Congressional Accountability Act, required us to comply with OSHA and to the extent that OSHA has other related laws we would be legally bound by those as well.

In new construction projects the agency follows the BOCA Building code. I would like to briefly discuss the history of the monumental stair replacement and the replication project. It was undertaken because of the structural failure of the brick foundations and the general wear of the treads after 130 years since their construction in 1863 as part of the Capitol extension designed by the Architect of the Capitol, Thomas U. Walter.

The project design started in 1993 prior to the Congressional Accountability Act and was completed in 1996. As you noted sir, it began under the supervision of Architect of the Capitol, George M. White, and was completed under the supervision of William Ensign, Acting Architect after Mr. White's retirement in 1995.

The project was intended to replicate the historic stairs as Thomas U. Walter had originally designed them but in a more desirable granite material. Consequently, the treads and risers were replaced in the exact configuration as the original stairs in keeping with historic preservation objectives.

Most of the lowest riser is seven inches or less except for the portion of the Southern and Eastern sections where it gradually rises to become ten inches above the sidewalk grade. It is important to note that this portion is not with the usual, direct path of traffic, either in or out for those stairs.

Although a riser height of greater than seven inches would violate the BOCA Code in a newly constructed building, it is permitted by BOCA for existing buildings, including historic buildings, or work on existing stairs where such work does not result in a reduction in safety from the previously existing condition.

There has been no reduction in safety from the previous condition in this particular case. In fact, safety has been increased because the marble material was changed for a more non-slip granite finish material. So the safety has been somewhat increased over there.

Also, BOCA does have a text of permitting the bottom riser of steps touching a sloping sidewalk to have a variable riser height. Of course, this doesn't in the least mean that the riser height over seven inches is to be optimal. It is certainly not optimal.

Although it is not technically a code violation, it needs to be changed. It is not an optimal conditional. And my predecessors in fact, considered whether it would be feasible to avoid this condition by adjustments to the adjacent sidewalk.

This is basically a 6-inch curb now above the street grade but an essential element of the final configuration of the street, the sidewalk, and the steps was the introduction of a curb cut for the access of the disabled. That cut occurred at the Southeast corner of the sidewalk.

Access for the disabled was essential at that location because it is a primary photo opportunity for members and their constituents. To exclude wheelchair access at that point would have violated the American With Disabilities Act, in the opinion of the Architects.

Moreover, the solution of raising the sidewalk to the grade to eliminate the riser problem was unacceptable in that it would have resulted in a curb height of 10 inches at the exact point of desired wheelchair access, which would have reduced the safety from the previous condition.

Another potential solution would have involved raising the grade of the East Plaza, essentially the street at that point, which would have allowed the sidewalk height to be raised in turn.

The reason the agency rejected the idea at that time was because the East Plaza grade was going to be changed as part of the future Capitol Visitor's Center Project, which as you know, Mr. Chairman, has been delayed. We anticipate that this grade change will be accomplished when the Visitor Center is approved for construction.

As you know, Mr. Chairman, I stated earlier that historic structures are usually given more leeway than other structures, and I had experience before I came here as a former Vice President of Rockefeller Center. But since local building code officials certainly vary in their interpretations and the rigor of their enforcement actions, there are certainly cases where interpretations and enforcement actions for any type of structure can be unreasonable and unduly burdensome on private business and citizens.

This Committee's call for a degree of common sense is certainly appropriate. I would be happy to answer any questions you might have, Mr. Chairman.

[Mr. Hantman's statement may be found in the appendix.]

Chairman BARTLETT. Thank you very much. Let me recognize Mr. Hill for his questions and observations.

Mr. HILL. Thank you, Mr. Chairman. Mr. Hantman, I am not sure a 10-inch rise is the right solution or the wrong solution. It certainly sounds like the only practical solution to the problem that you are dealing with. And I guess I would ask for your comment

on Mr. Gullo's situation in working with an historical structure where he had to tear out a ramp for a quarter of an inch tolerance.

Mr. HANTMAN. I think Mr. Gullo's comments were really right on-target. Clearly, if we have the intent trying to be met, the contractor tried to fulfill the code as written—for a quarter of an inch, for a half an inch, for an inch, whatever the issue is—it certainly in my mind, as a professional, as a reasonable person, that it was certainly unreasonable to demand ripping out something of that nature.

Mr. HILL. And a 6-foot long concrete slab, how much will that shrink when it cures?

Mr. HANTMAN. You are absolutely right. It could have shrunk during the curing process.

Mr. HILL. I guess I am kind of interested in solutions and I would like to talk a little bit about that. I guess I would probably ask you, Mr. Rose, if you could respond to this.

First of all, there are soft costs and hard costs in construction. Soft costs are the development fees, the design fees, the permitting process, the inspection process. Could you give me some idea today what portion of the cost of building a house is soft costs and what portion are hard costs?

Mr. ROSE. Are we talking about a home or an apartment?

Mr. HILL. Well, both I guess.

Mr. ROSE. Okay. On a single-family residence today, let us start with the profit goals. Most home builders in the United States make somewhere between three to five percent profit on the sale of a home.

This can be verified by looking at the publicly traded home building companies that try and show their profit as high as they possibly can to drive their stock price up—not as much as an Internet stock—but they try and drive the price up. And it usually runs from three to five percent.

Land in different parts of the United States typically run 20 to 22 percent. Unfortunately, those of us in Maryland and Washington, D.C. know that that is typically 30 to 35 percent of the sales price. A hard construction cost, the bricks and sticks and mortar, runs somewhere between 42 to 45 percent in a Washington, D.C., New York, L.A. urban environment.

And then the financing depends on the remaining dollars that are left that are a combination of the construction financing while the building is being built before it is transferred to the buyer, and the dollars spent to assist the buyer in obtaining either a VA/FHA or a conventional finance of the property.

So if a home is 42 percent hard and 20 percent land, that is 62 percent and 5 percent profit, that's 67 percent. So you have 33 percent up for interpretation, and in some areas it is even less than that. If the land jumps up in Washington from the 20 to the 35 percent, you are down to 18 percent.

But it is usually extremely well documented, particularly if it is in a multi-family situation and it is approved by all the local people. You have a superintendent, a project manager, customer service, et cetera. And the issue in terms of the low-income housing tax credit, is that the buildings are approved, the tax credits are approved.

And then ten years later or eight years later say, Mr. Hill, if you were an investor in the project, you file to the IRS to get your tax cuts. IRS sends back and says no, you can't have that. So the investor immediately goes to the syndicator and says, Mr. Syndicator, IRS says it is not approved. He says, well, it is approved by the state and all the government agencies. How can this be reinterpreted?

Then they go back to the builder who built it in the first place and then they spend hundreds of thousands of dollars trying to negotiate this settlement with the IRS to prevent the apartment building from being closed down, and then the money that they get, they take the money and it goes back to the Treasury.

It doesn't go back to the states, it doesn't go back to anyone else. And if you had to go back and look at your exact records ten years ago—

Mr. HILL. That would discourage me from making an investment, I can tell you that.

Mr. ROSE. And that is the problem, because the investors will stop making investments, there will be no more low-income housing tax credits, because the investors will be scared to death that they are going to get hurt. The middlemen, the syndicators, won't want to do it and the builders sure as heck don't want to build it.

Mr. HILL. I was actually kind of headed towards discussing those soft costs—design fees, inspection fees, financing fees, supervision costs, allocation of overhead—are very time-sensitive. In other words, if a project takes longer than anticipated you lose control of those costs, isn't that right? That comes right out of your profit?

Mr. ROSE. Absolutely.

Mr. HILL. And so when you have to deal with changes in the project as the project is moving forward, it can add to those costs. In other words, Mr. Gullo is talking about his experience with having to delay his construction project a month for one situation and two weeks for another. Those add to the soft costs dramatically.

Mr. ROSE. Oh, time is the biggest killer of all. If you are only making a five percent profit in the first place and if you just said it is a \$100,000 house and you are making \$5,000 profit and your hard costs are 42 percent, that is \$42,000. If you have a 10 percent variation that is \$4,200 right there. That 10 percent variation is a 90-some percent variation of profit diminution.

And that is for—you know, it is a \$100,000 house if you have a $7\frac{1}{8}$ percent, $8\frac{1}{2}$ percent construction loan plus points, plus taxes, say it is a 10 percent—that is a 10 percent interest. That is \$10,000 a year divided by five. If the project is delayed at all the profit is totally gone and you are into a loss situation.

Mr. HILL. And it seems to me your suggestion of some sort of a safe harbor solution with regard to low-income tax credits, that also would apply with regard to design. There has got to be some way to empower local inspectors to sign off on the federal requirements and create some safe harbor that people can move forward with their construction and complete their project.

Would you agree with that? Is that one of the solutions?

Mr. ROSE. Yes, I would say that is definitely a solution.

Mr. HILL. Mr. Boehm, what should Congress do to assure that the Legal Services Corporation implements the intent of Congress?

Going back to this North Carolina case, did the Court impose any sanctions on the Legal Services Corporation for purposely violating the law?

Mr. BOEHM. No, all they could do was remand it because—remand it back to Legal Services and say, go and revisit this complaint.

And the reason for that is the Legal Services Corporation Act, which was actually passed into law 25 years ago today—it is its 25th birthday—under that only one body, the Legal Services Corporation, has the regulatory and enforcement authority to enforce violations of its rules.

Congress forces them to do the rules but only LSC can do it. So they develop this cavalier attitude if they don't like a rule they just will enforce it in a very lax way. And this federal Judge, Judge Herlong in South Carolina, told them what you did violated all the laws.

But all he could do is remand it back to them to say, now decide it based on the fact that the law says you have to have a client, and these folks didn't have a client.

Mr. HILL. So what should Congress do to make sure that Legal—I mean, in essence what you are saying is, is that they have oversight over themselves.

Mr. BOEHM. Well, there is some oversight, and there is an example that is in my written testimony. I didn't go into it as much because it was less small business. When Congress said no attorney's fees in 1996, the Legal Services Corporation interpreted that to mean they could charge attorney's fees to the poor and disabled.

That was directly contrary to what Congress said and so Congressman Hal Rogers who chairs the Appropriations Subcommittee that deals with Legal Services, essentially chewed them out at the hearing and said, we told you no attorney's fees. Now you are charging attorney's fees in cases involving the poor and disabled. You are on thin ice. And as a result of that tongue lashing they went back and changed it to no attorney's fees.

But the problem is you are dealing with a program with a lot of lawyers. They know a loophole when they see one, and you can't always get Congress to jump in the way Congressman Rogers was able to do in that situation.

What I would propose since only 5 percent of the legal assistance to the poor in this country comes from Legal Service's lawyers—the other comes from private lawyers doing pro bono, and even that five percent is based on their case figures which have now been shown to be as much as two-thirds off—that Congress just eliminate the funding but do other steps to encourage other pro bono. And that I think would solve the problem.

Mr. HILL. Thank you very much. A very interesting panel. Thank you, Mr. Chairman, for holding this hearing and thank you for the time.

Chairman BARTLETT. Thank you, very much. Mayor Gullo, thank you very much for your testimony. You know, when you tell this story to the average American they are just disbelieving. When I first heard the story I thought it was a quarter of an inch in height, but this is a quarter of an inch in length over a 6-foot length?

Mr. GULLO. In length. My understanding—and again, I am not an expert in the building area—is that the shorter the length would be the more of a percent grade it would be. And so it has to make a certain grade to go down that height, and my grade had to be a 6-foot ramp. And it was 5 feet 11 inches and three-quarters, and so therefore there was some percent grade that was not being met and that is why we had to redo it.

Chairman BARTLETT. You used the legal term “de minimis”, and this was certainly de minimis if ever there was a de minimis. I am not sure—and I was in the building business and I have measured a lot of things—I am not sure how precisely you can measure the length of a concrete ramp that approaches almost asymptotically both the bottom and the top.

I am not sure, you know, when you cut off and say, that is the bottom of the ramp and that is the top of the ramp. This is a poured concrete ramp with the troweling going over the existing at the bottom over the existing at the top, and I am not sure you can read a rule precisely enough to say that that is a quarter of an inch out of spec.

But this is a great example that illustrates the mindlessness of many of these regulators, and the fact that he was unbending and that you would rather put in another ramp then go through all of the legal costs involved in protesting this.

You know, this just shouldn't happen in America. It just shouldn't happen in America.

Mr. Rose, thank you very much for your testimony. You mentioned that if the regulatory agencies approved the plans ahead of time, that they make no guarantees that after the project is finished that they will in fact, be in compliance. Is that what I heard you say?

Mr. ROSE. What I said was that when the law was written in 1988 Congress told HUD, you must issue guidelines so people will know how to build a building. Because we don't tell them how to build the buildings you have to interpret. They have no way of doing that.

They did not publish their first set of guidelines until '91 because they said it is a very complicated issue and we really don't understand the ramifications. And based upon that they issued their own book in '96 and the whole inside cover was a disclaimer that basically said, if you follow this you still haven't met fair housing because we are not exactly sure what fair housing is.

So it opened it up even more so to these groups that are suing small businesses and small home builders every day based upon projects they built eight years ago. Even if they did it according to their own guidelines and publications they still could be sued because they themselves, said they did not totally understand the issue.

And it wasn't until 1998, it was just last year, that they republished this again and finally agreed to remove the disclaimer that said that they were disclaiming everything that was in their book.

Chairman BARTLETT. Your story reminded me of a small business in Carroll County. I am having trouble remembering the name of the proprietor of the business. He is a disabled person who had

advanced arthritis before he was born, and so he has extremely limited movement of his arms and legs.

But this has not deterred him from being a successful small business person. And what he does is to get all of the regulatory agencies together for final plan review. And he gets them all at one time in the same place and he tells them, this is your last opportunity for input. After today, this is the way it is going to be built and you are going to have to live with the product.

He came to this because of his experience with a restaurant owner who had his plans approved and he was building them, and ADA came through and told him, we approved the plans but we are sorry. Your bathroom wasn't big enough. You have got to make the bathroom bigger. And so he did that; tore out walls which were already in and made the bathroom bigger.

And then the Fire Marshall came through and said, you can't do that because when the door of that bathroom is open you cannot have proper egress from your building and so you cannot do that. So here was the poor restaurant owner caught between these two regulatory agencies. And so this young man saw an opportunity for a business to avoid this kind of problem in the future.

I noted you said that HUD was supporting—actually helping to pay for lawsuits against builders?

Mr. ROSE. HUD has a bounty system that we refer to it as. They have \$10.5 million a year that they issue to these groups to encourage them to sue builders. All you have to do is send a letter in to a builder. Like in the case of Idaho, this group sent in letters to everybody saying, we feel that your buildings don't meet fair housing. Please send us your plans and all that kind of stuff.

And the prior cases that were mentioned is, everyone wants to settle the case. It is not worth going to court and spending tens of thousands of dollars. So they get money that is settled in the case, they get money from HUD to sue in the first case, and the investors don't want to build buildings any more, they don't want to own the buildings any more.

It is even so ridiculous that if it is a condominium building and each person owns a condominium and they say, we don't care that this is a nondisabled person in this unit, we want that person to remodel their unit to make it with railings or some other—in their interpretation.

To me, everything should be universal design, which would make it handicapped accessibility without railings. But because of the way the law is interpreted, everyone thinks railings should be there and ugly sinks and all that type of thing.

As my position on the American Paralysis Association Board, unfortunately, many times a year I meet with families of people who have just been disabled or put in wheelchairs, and besides the trauma of, what are they going to do in the future, they are very concerned about their home. What is their home going to look like?

So I usually take them to my house and say look, I have no railings, I have, you know, different things that I have done that may not meet the letter of the law but it sure allows me to get around in my wheelchair.

And you can make a universal design that is a very attractive thing and it is nothing to be fearful of. We have enough things just

you know, in family relationships today that that is something you should not be concerned with.

Chairman BARTLETT. The other day in thinking about our history and how we got here as a country, I re-read the Declaration of Independence. And when I came to one part of it I thought that I was reading some current literature. This was one of the reasons that our forefathers felt that they were justified in separating themselves from England. And let me read this paragraph, this reason.

“He”—that was the King then; now it is our government and our regulatory agencies—“He has erected a multitude of new offices and sent hither, swarms of officers to harass our people and eat out their substance.”

Now, this was grounds for a revolution, in declaring your independence. We have kind of gone full circle, haven’t we? Let me read that again. “He has erected a multitude of new offices and sent hither, swarms of officers”—all of our regulators—“to harass our people and eat out their substance.” Which is pretty precisely what these regulations and their mindless implementation is doing today.

Yes, Mr. Rose?

Mr. ROSE. I think that is extremely appropriate. The only difference is that these swarms of regulators have said that there are not even enough of them that they are going to pay your neighbor now to turn you in and get fees; which is even more frightening a thought with these bounty systems. Which is a sad thing to say about our 1999 society.

Chairman BARTLETT. They have a bounty system which recompenses neighbors and persons that are not directly involved?

Mr. ROSE. Oh, they have zero involvement; no involvement whatsoever. I could earn a very good living if I wanted to be unscrupulous, without even going to the projects; just getting a list of every multi-family project that has been built in America and send them a letter. All I have got to do is send them letters from posting and I can make millions of dollars. No problem whatsoever.

Chairman BARTLETT. Now, was this required by law or was this done by the regulators in addition to law?

Mr. ROSE. The law does say that there should be this type of thing. It doesn’t spell it out exactly the way they are interpreting. The law was really intended to take care of more of the education process, but in the interpretation of it I think it has gone way above and beyond.

When you spend \$10.5 million this year alone to pay for lawsuits as opposed to only \$4.5 million to educate the problem—if you did a survey of the Mayors and the counties and the cities and the states that approved the building plans—which is the main issue.

A builder has a set of plans and they are going to build an apartment project. They take it in. They have the meeting like you described the meeting. They have everybody together. They have the Zoning people, they have the Park and Planning people, they have the Fire Marshall, they have everybody. Does this meet all your plan requirements? Everybody says yes, they build the building.

Ten years later they get a thing. It doesn’t meet the federal fair housing guidelines and everybody says, well we were never noti-

fied. We never received anything. The inspector inspected it the way he thought was right, the permit reviewer reviewed it the way he thought it was right, and everybody did it the way they thought it was right.

Now the federal government is now suing—paying money to people to sue.

Chairman BARTLETT. You mentioned that compliance with HUD regulations has resulted in decisions by IRS that the implementation was incorrect and therefore IRS is collecting monies?

Mr. ROSE. The Low-Income Housing Tax Credit which was passed in 1986, the intent was that the local states would get their shares and appropriation of tax credit dollars. They would give these tax credit dollars out on a project-by-project basis after they went through a 3-step, a multistep review process.

They are approved again, by the states and everybody else. Now IRS—and it has been approved by HUD and everybody has approved the building. The buildings are built; they have been occupied; people have been living in them eight years, ten years, seven years.

They now receive a letter from IRS that says aha, you as an investor filed your income tax return. In your income tax return you took these low-income housing tax credits that you bought that allowed the Fair Housing program to be built. We think you got too much credit. We want to review everything that everybody else has approved and we, IRS, is going to tell you what is right or wrong.

So they immediately call up the syndicator. The syndicator says, how is this possible? This building was built eight years ago. The right people are in it, it is approved by all the municipalities. In some case they are award-winning projects that everyone says is exactly what the community wants. How is that possible?

They say, well we don't know. They call IRS, they call the builder, and they end up in a room spending hundreds of thousands of dollars trying to settle the lawsuit with IRS and giving IRS money plus their own lawyers money. And then that money just goes into the Treasury. It doesn't even go back into housing to create more low-income housing tax credit in the first place. The money just goes in a totally different direction.

Chairman BARTLETT. Is the problem that HUD had not cleared their requirements with IRS?

Mr. ROSE. I couldn't say that. I think IRS is just changing the rules. They were playing football; now they're playing basketball. You know, it is an uneven—it is just like the time delays that Mr. Hill was talking about. You can't all of a sudden change the rules when you are in the middle of the process.

Everybody has approved these programs for years and now all of a sudden IRS has a different interpretation of what they are. But you know, they are also saying that they are only auditing I believe, 400 companies, but they are auditing 400 development companies that may have 20 projects or 30 or 40 projects each, so you are getting into thousands of projects.

And you know, this has been going on for two years and it is building and building and building. And I think it is from—I don't build low-income tax credit projects, but from talking to the various people who are in that market they are seriously considering just

totally getting out of it because their investors have had it, the syndicators have had it, and they said it is doing what Congress intended it to do but they can't fight with IRS. It is impossible.

Chairman BARTLETT. Thank you. Mr. Boehm, you mentioned the carpooling situation. Are the environmentalists weighing in on this? Clearly, this is an impediment to carpooling. Are the environmentalists weighing in on this?

Mr. BOEHM. Well, the regulations came from the Department of Labor, so we can only guess who may have had an input or not had an input. But at the time they were considering the regulation and were taking comment, a lot of the businesses looked at the legislative history and they said, wait, Congress said this is exempt but the labor folks didn't really hold it in high regard what Congress said and came up with that regulation anyway. We don't know if there were other folks weighing in. At least I don't.

Chairman BARTLETT. I meant weighing in after the decision by the Department of Labor. Because this clearly is an impediment to carpooling.

Mr. BOEHM. Yes.

Chairman BARTLETT. If you carpool you put yourself at risk, depending upon how the IRS wants to look at the costs involved there. So what that means is that people not to be put at risk will simply not carpool, so this means more cars on the road and this means more pollution.

Mr. BOEHM. You are exactly right.

Chairman BARTLETT. I would think that the environmentalists should be weighing in on this. You haven't heard them weigh in on it?

Mr. BOEHM. I have not. I have not. But you are absolutely right; that is the net effect.

Chairman BARTLETT. There is an old saying that birds of a feather flock together and it may be that the environmentalists are loathe to do battle in this situation.

Mr. BOEHM. I couldn't say, but it puts the farmer in a very, very awkward position because he can't go to each one of his workers each day and say, who did you carpool with today? Did he charge you the right number of cents per mile? how many miles did you go?

And even if he did all that, which would be highly impractical, if it is over it doesn't matter with respect to their intent because they could still find that the individual worker was a labor contractor and therefore the farmer was jointly liable because that is how they interpret those relationships, and then the farmer is still behind the 8-ball legally.

It is a very misinterpreted regulation with a lot of very negative effects.

Chairman BARTLETT. You mentioned the Legal Services Corporation. I said in introducing you that I was very familiar with what they had done. They I think, with malice aforethought, put a whole industry—all the orchard industry in Western Maryland—out of business. They did this by systematically harassing them.

They would get the migrant workers to sign a form. The migrant worker had no idea what the form was. It could have been a blank form that they subsequently filled in as a complaint that now re-

sulted in a suit. And our biggest orchard there was owned by a wealthy German, and just a little bit of this harassment he said, I don't need to do this. I quit.

So you can go out there now and see his acres and acres of apple trees, unpruned, untended. And there was—I don't know if it has rotted down yet—but a few years ago there was a very large pile of apple crates right out in the open; the picking boxes. He just quit and walked off. And there is not now a single job in orchards in Western Maryland.

Mr. BOEHM. And not only are you right, Mr. Chairman, our National Legal and Policy Center wrote a book, "Harvest of Injustice" about two years ago that interviewed many of your constituents who had previously worked in apple orchards and some of the former owners, and it was devastating.

And unfortunately, it wasn't limited to Western Maryland. The sugar cane industry used to employ 10,000 Jamaican workers. Now they use equipment because equipment doesn't file frivolous lawsuits against the farmers. So the very people that they were most trying to help, the workers who depended on those jobs, have been the unintended victims of these waves of lawsuits.

And the real purpose for the lawsuits has been, as many of the Legal Services lawyers said is, they didn't like the H2A program where people were brought into the country to help with the harvest because it ran contrary to the United Farm Workers Union because you couldn't organize folks who were already getting four or five times what they would make in their home country. They didn't want to join a union.

And so for political reasons they have run these jobs out of the country and destroyed some industries and small business owners in the process. And hurt the people that ostensibly were supposed to be helping.

Chairman BARTLETT. You made an observation which I don't think everybody understands and that is, that these migrant workers come here because they can work a part of the season here and make far more money than they would have made working all year back home.

Mr. BOEHM. That is correct. They get paid the prevailing wage, they get paid all of their transportation, they get paid their housing, and they fight to get into this program at a time that, as we all know, there is a real labor shortage in this country.

So it is a win/win situation. It is a win for the American consumer who eats the fruits and vegetables picked, and it is a win for the foreign workers who get a job that allows them to save a lot of money and go back to their home country.

But it is a lose/lose when the lawsuits start flying because then the programs shut down and you have vacant orchards as you do in your district.

Chairman BARTLETT. Of course, Americans have benefited from increased agricultural productivity. When I was younger the general rule of thumb was that you spent 25 percent of your income on food. Today that figure is down to about nine or ten percent, and food is so cheap today that 2 years ago for the first time in our history, more Americans ate meals outside the home than in the home, and that disparity is growing.

I tell people, please don't criticize farmers with your mouth full. But what this kind of regulation is going to do is to increase the cost of food, and every American is going to pay for these excesses in regulation.

Mr. Hantman, you did a pretty good job of defending the indefensible. Let me just look at the regulations here. And they have not changed. I remember them as $8\frac{1}{4}$ inch steps because I built houses and that is what it is inside a house. If you are outside it is seven inches.

And the exceptions here for treads and risers, any stairway replacing an existing stairway within a space where, because of existing construction the pitch or slope cannot be reduced. This really wouldn't pertain to what you did there. We will go out in a few moments to look at the steps there.

But there were solutions to your problem that would have avoided the violation. You mentioned they could have raised the curb, but if you were not going to have an excessive curb height then you would have had to have raised the parking area there.

We are only talking about two inches. I suspect that you could have sloped that sidewalk, I guess you call it, at the bottom of the steps. You might have sloped that the two inches to avoid the excess, and I think you would have still been less than the one per foot.

And certainly you could have sloped the 15 or 20 feet of the parking area and no one would have known it. Had this been a job anywhere other than a government job, that absolutely would have been done. Or after the job was completed the regulators would have been around, as they did to Mr. Gullo, forcing you to tear it out and do it over again.

You mentioned historic structures and I was reminded of a story in New York City with Mother Teresa. And they wanted to buy a building for homeless people, many of them dying. And the regulators told them that they could not use the building unless they put in an elevator.

And Mother Teresa's people told them, we can't use the building if we have to put in an elevator because we can't afford it. And the regulators held their ground as they did with Mayor Gullo. And so Mother Teresa and her people went away. And now there are people dying on the street who might have spent their last days and hours in that building.

Now that was an historic building. It was an old building. But the regulators would make no concession for Mother Teresa. To the average American this is the ultimate in mindless enforcement of the regulations; to prohibit Mother Teresa and her people from using a building in New York City to take homeless people in off the street so they could die with some kind of dignity.

What do we have to do to correct this situation? Some of these agencies flagrantly violate the intent of the law. What do we have to do—and by the way, Mr. Boehm, I voted against Legal Services Corporation. I denied them all of their money. We don't need them.

If we give some minimal incentives there is a lot of pro bono work done now; 95 percent you say, of all of this is pro bono. The other five percent can easily be accommodated by a tax law that

gives some incentive to lawyers to do this kind of work. And they will be unlikely to have a political agenda.

And I think much of the activity of Legal Services Corporation is in pursuit of political agendas rather than pursuit of the rights of the people that they are supposed to be representing. So I did what you would have liked the Congress to do. Unfortunately, not enough of us did that.

Mr. BOEHM. Thank you.

Chairman BARTLETT. And we still have Legal Services Corporation. But there will be another day and there will be another vote and we will see what happens.

But what can we do to reverse this situation? We don't need repetitions of the kinds of horror stories that you tell. And by the way, one association couldn't provide a witness today because they were concerned for recriminations.

They wouldn't come and testify. We have not been able to get an orchardist from Western Maryland to come and testify as to their mistreatment by Legal Services Corporation because they are afraid of recriminations.

Mr. BOEHM. Yes, in fact, we have had the same problem. I remember that instance and we had the same problem when Congressman Gekas had oversight hearings on Legal Services. Time and again we would contact people who were really victimized in a very abusive way by Legal Services lawyers.

They were afraid to testify; so much so that Congressman Gekas, during the reauthorization hearings a couple of years back, twice had to remind the Legal Services program lawyers there in the room, that it is against federal law to retaliate against a witness.

One of the farmers who got up to testify from North Carolina, Stan Eury, predicted that he would be sued as a result of his testimony. And just a matter of a few months later he was in fact, sued on some fairly trumped-up charges.

So what you experienced with your farmers not wanting to come out publicly and say it, Congressman Gekas experienced as well.

Chairman BARTLETT. What can we do? What should we do?

Mr. BOEHM. Well, getting back to the point, we have no shortage of lawyers in this country. We have 900,000 to a million lawyers; a lesser number in private practice. Up and down my block everybody is a lawyer in this Washington area. Most of the money, most of the resources to help poor people does not come from Legal Services. At best it is 5 percent. The other comes from pro bono, it comes from contingency lawyers.

What we need to do, I think, is de-lawyerize—to coin a phrase—lots and lots of the everyday disputes of poor people. We do that by raising the jurisdictional amount of Small Claims Court, where people who have a problem that involves a couple of hundred dollars—it is futile and against common sense to have a group of lawyers fighting over relatively small amounts of money.

And I think what you need to do is to take a lot of steps to have mediation, arbitration, for these smaller disputes. The problem you run into is that the American Bar Association has a vested interest in maintaining all sorts of things. They will fight tooth and nail against any other type of professional to render any kind of legal assistance.

Never mind that many countries around the world, those exact types of problems are handled by non-lawyers. We have the largest per capita lawyer population in the world. Other countries, Western countries, countries that make good cars and good products who seem to be very, very advanced, have figured out you don't need a lawyer to handle every small problem.

We have it in this country and it is largely because there is a vested interest by the bar in keeping things in court. They are the biggest proponents of legal services because every time a legal services lawyer sues a small businessman that small businessman has to go out and hire a lawyer. And so it is subsidized litigation and as everybody knows, when you subsidize something you get a lot more of it.

And so they are in favor of increased taxpayer subsidization of litigation. The solution I think, is just the opposite. You go and take a page from these other countries' books. You come up with ways to solve small, everyday neighborhood problems without getting lawyers involved.

Chairman BARTLETT. That kind of legislation is tough, because about half the Members of Congress are lawyers.

Mr. BOEHM. That is true, and the Bar—I am going from here to a Member's office who is being visited today as we speak, by a delegation of lawyers saying we should be spending lots more for Legal Services. So they do have a vested economic interest.

On the other hand, poor people and middle class people for that matter, have a vested interest in being able to solve their problems without having to hire lawyers. If you have a \$15,000 or \$20,000 dispute and you have to go to court, you really have a \$50,000 dispute depending on—if you have to go through trials or if it is in Federal Court. And that is just against common sense.

Chairman BARTLETT. It is indeed. Do other members of the panel have suggestions as to what we might do? Mayor Gullo?

Mr. GULLO. Well, being an attorney I have to say that the government regulators were not afraid of doing something to an attorney when he was remodeling his law practice. I mean, they saw the sign right there.

I guess I would urge more accountability in the government. And I say that for two reasons. First of all, if the government were more accountable for their mistakes—again, in my situation, they approved the plans. They required the plans, they reviewed the plans, they approved the plans. They should be bound by their decision and they should say okay, these plans are what we are going to build.

And I didn't mention in my testimony but there were other things that they made me change similar to what was talked about: taking out walls and adding doors after the fact.

If they were more accountable and I had some recourse towards them to say that I am going to take you to Court and win, then I am going to be able to recover my costs, my attorney's fees. But right now you make an economic decision that number one, I have to go to Court. It is not a Small Claims matter because you are dealing with the equity jurisdiction.

Number two, my construction loan is already having interest on the part of the building I have already paid the contractor. And

number three, my business isn't productive because I am outside the business looking in.

So there is an interesting principle, at least in Maryland law, that the government can't use the estoppel principle. Meaning that if you came for a building permit and one of the clerks gave you the permit but down the road I found out that permit shouldn't have been issued, I am not estopped from coming after you, stopping you and making you correct the action.

In the private sector we have that principle; that if I did something for you and had a contract with you and I found that, you know, you hadn't done something right but I okayed it, I am estopped from coming after you for that.

That doesn't apply in Maryland at least, and I think that accountability is one of the things that we really have to look for because it levels the playing field. We all play by the same rules.

Chairman BARTLETT. Thank you very much. And what you said about the lack of accountability is also true. You can get approval from a government agency to proceed. You proceed consistent with that approval and that does not mean that you cannot be challenged by that same agency in the future for not being in compliance.

I guess this needs to be written into law, and I appreciate that, because clearly we have to do something. Everybody wants a safe workplace, everybody wants safe drinking water, everybody wants pure air. There is no disagreement as to the objective.

The only disagreement is to how we get there. And there is nobody that I know that really has any fundamental disagreement with the intent of the original legislation in all of these cases. The problem comes with the writing of the rules.

And sometimes as Mr. Boehm pointed out, the agencies set out to circumvent the law. Their intent is to not abide by the law. And they use very creative reasoning to get to where they are, redefining what "is", is. Quite literally in the one case, redefining what "is" is, "is" became "was" in that case.

Well, let us move our hearing and we will adjourn our hearing at the Capitol steps, and let us just go from here to there. We will have a brief discussion there as to the problem there and then we will adjourn our meeting there.

[Recess.]

Chairman BARTLETT. We were just noting that the existing violation here—this step is a full two inches higher than code. And in addition to that it is clearly more than three-sixteenths of an inch different in height than other steps.

The code says two things. One is that the maximum height of a riser outside like this is 7 inches. And the second thing the code says is that no two adjacent steps can be more than three-sixteenths of an inch difference in height. And no two steps in a run of steps can be more than three-eighths of an inch different in height. And this is a clear violation of both the seven inch maximum and the three-sixteenths inch difference.

It could have been avoided very simply by either increasing this slope a little bit or raising the curb and increasing this a little, or not increasing the slope here at all but simply raising the curb 2 inches and then sloping a little bit out here you could lose 2 inches

out there very quickly. You would never notice it. Nobody would have known that you did it.

The violation here is clearly I think, an oversight. Nobody was paying attention. They didn't have to pay attention because the government is not subject to these regulations.

When we came to Congress, when we came to power in '94, one of the first things we did in '95—and this was already about to be completed by that time, it was kind of cast in concrete if you know what I mean—but the first thing we did was to say that Congress was going to be held to the same regulations as everybody else. Now that clearly isn't true because were this anywhere else in our country that wouldn't be there for all this time.

The Architect said that this wasn't a major travel route, but every Congressman that walks from Cannon House Office Building—I was there for 6 years—uses these stairs that they go up. That is how I first noticed it and it was the first time that I did it.

I was a home builder. I notice steps that are out of code. And the first time I took that route I said, this is not right. And everybody that comes from Cannon House Office Building goes this way up the steps.

And we had the Chief Compliance Officer here and he says yes, it is out of code. What we will do is to put a sign there saying, watch your step. My response was, would you let GE do that? And he was silent. Clearly, they would not let GE do that. If GE had this violation they would have torn it out a long time ago.

That is by the way, a hazard. Many of the things that they hang up on in the real world rather than here are not hazards. That clearly is a hazard. When you are coming down those steps an extra two inches at the bottom is a real jolt if you are expecting a step the same size as the steps above. And you notice that difference.

The first step being out is not as bad as others being out because you get a rhythm in going up the steps and the reason they have the three-sixteenths of an inch is if you are out much more than that you are going to be tripping on the steps. That is not as true for the bottom step.

But this is a clear violation of the code and I don't think there is any way to rationalize it, that this had to be done, because you easily could have raised this. So in effect, it was torn out to there. You know, you would have had no problem at all getting an inch slope there and no problem at all getting another inch slope here. No one would have objected to that or hardly known it. And then you wouldn't have been out of compliance there at the step.

But we don't want the step torn out. When Newt Gingrich was here he wanted the step torn out. He said, we need to make an object lesson of this. We are going to be subject to the same rules as everybody else or we will change the rules.

Now, I would hope that we would change the rules before we jackhammer this step out. But what we want to do is just to use this as an example. So I mean, nobody has fallen here, and thousands of people have gone up and down those steps since they have been put in and nobody has fallen there.

That is a risk. It is clearly a minimal risk because nobody has fallen there yet. And what we want is common sense application of these laws when the regulations are written and when the regulations are enforced. And this wouldn't be permitted anywhere else in our part of the world and it shouldn't be permitted here.

What we need to do is to change the regulations so that some common sense is used. And Mayor Gullo, this just is so different from your experience. He had a 6-foot long ramp that was one-quarter of an inch out in its length, not in its height. One-quarter of an inch out in its length and he was forced to jackhammer it out and put in a new one.

Now, if you had to do that as a struggling, young, small, businessman in New Windsor, Maryland, what are we going to ask the U.S. Congress to do here? I mean, if we are going to pass these laws that result in these regulations that are having the effect they do on the rest of the world, how do we justify this and what are we going to do about it?

What I hope we do about it is, is rewrite the laws so that the regulators are going to have some accountability, will have to be reasonable in the implementation of the regulation. I don't want to see jackhammers in here tomorrow. It is my money that built these steps.

They were built wrong but you know, we can live with it after they are built. I would have preferred they were built without the violation, but now that they are built I sure don't want to use my money and your money in jackhammering the steps up. But I want this same kind of rationalization to be applied to other situations so that there is no more Mayor Gullos and jackhammering up a ramp which is one-quarter of an inch out in length.

I am not sure that I can measure that quarter of an inch and I was in the building business. Because that ramp is approaching the street level and approaching the threshold at the door up there. And it is almost an asymptotic thing. Where do you cut off the line? Where does it stop, where does it end? And it was mentioned at the hearing that if you pour a 6-foot ramp it may shrink a quarter of an inch in curing.

Well, I want to thank you all very much for coming. Do any of the witnesses have any comment relative to this and how this might be used to produce good things for the average citizen out there?

Mr. GULLO. I guess, since this is clearly a situation like my ramp was, you can notice all the people going up and down and no one is falling, there is not a sign here. Maybe the regulations are the things that are wrong, and if you can say, well look at this situation right here.

It is not presenting a hazard more than anything else is. Maybe we need a little bit of leeway. And you empower the inspectors to give you that leeway. They gave the leeway because it was the Capitol, but maybe we need to apply it other places as well.

Chairman BARTLETT. Well, I want to thank you all very much for coming. I want to thank the Architect for accommodating us and providing an opportunity for us to come here. And we will now adjourn our hearing and we will leave the record open for several days. There were members of our Committee who wanted to be

here and couldn't because of the press of other Committees and they may want to ask questions.

So we will leave the record open for several days. And written statements will automatically be put into the record. If any of the witnesses want to provide additional information just give us a written statement and without objection that will be automatically included as a part of the record.

Well, thank you all very much for coming and our hearing will now be in adjournment. Thank you.

[Whereupon, at 12:10 p.m., the subcommittee was adjourned.]

ROSCOE BARTLETT, MARYLAND
CHAIRMAN

DANNY K. DAVIS, ILLINOIS
RANKING MEMBER

Congress of the United States
House of Representatives
106th Congress
Committee on Small Business
Subcommittee on Government Programs and Oversight
B-363 Rayburn House Office Building
Washington, DC 20515-6110

Opening Statement

Chairman Roscoe G. Bartlett

Committee on Small Business
Subcommittee on Government Programs and
Oversight

Good morning and welcome to this hearing of the Subcommittee on Government Programs and Oversight of the Committee on Small Business. A special welcome to those who have come some distance to participate and to attend this hearing.

An important focus of this hearing is the unnecessary burden placed upon small businesses by needless regulations and lack of common sense in enforcement of regulations. In previous hearings, small businesses from various parts of this nation testified to the problems that federal regulations caused them.

This hearing again provides a national forum for small businesses to express their views on whether present federal regulatory programs are stimulating or deterring job growth and economic development.

Another - and equally important focus of the hearing - is the fairness with which regulations are enforced by Federal and State entities. Have regulatory agencies in the enforcement of regulations lost sight of the need to be fair and to use common sense? Is there a double standard applied in the enforcement of regulations when the violation is caused by government itself?

In the course of the hearing, the Subcommittee will view and take testimony concerning the lower step on the East front of the Capitol which is in violation of code requirements. If this same condition existed with respect to a small business, the regulatory agency would have required the small business, at great expense, to correct the situation.

However, since it is the House of Representatives that is in violation, no enforcement action has been initiated. Selective enforcement such as this graphically illustrates the disproportionate regulatory burden that small businesses are required to bear.

Mayor Jay Gullo of New Windsor, Maryland, our first witness, who is also the owner of a small business, will tell you of his experience with building a wheelchair ramp that was found to be a fraction of an inch too short.

As a former home builder, I was shocked at how grossly out of code the House Capitol steps is. Unfortunately, my experience and those of most small businesses will show, the fact that a reasonable explanation for the discrepancy wouldn't be acceptable if this wasn't the U.S. Capitol building.

My reason for pointing out the code violation with respect to the Capitol step is not to have the step replaced at great expense, but for the purpose of bringing reason and fairness to the regulatory process.

I am most appreciative that you have taken time from your busy schedules to participate in this hearing. We look forward to a lively discussion. Thank you again for being here.

*Statement by
Congressman Danny K. Davis
on Common Sense Regulations
Wednesday, July 27, 1999*



Mr. Chairman I thank you for this opportunity to discuss this very important matter and I welcome the testimony of our distinguished witnesses.

Mr. Chairman the debate on the problem of complying with regulations and dealing with regulators is always a major topic of conversation. At first, the paperwork burden of the Internal Revenue Service (IRS) was the primary concern because preparing a regular payroll is a constant reminder of the numerous rules and regulations dealing with tax withholding and reporting.

But businesses' concerns are not limited solely to paperwork issues. Small business owners often fear that they will inadvertently fail to comply with some obscure rule, and that a government inspector will show up, close down the business, and drive them into bankruptcy.

That is why we are here today to take a look these obscure rules and there application. I'm sure many on this panel believe, with some justification, that the government is more interested in obtaining penalties than in promoting compliance with the law.

Although I disagree with that I do believe we should take a valid look at those regulations that lack common sense to create

proper legislation which contains language which addresses these issues and situations. Again, I welcome the distinguished witnesses and welcome their testimony.

Thank You.

**TESTIMONY OF JACK A. GULLO JR.
BEFORE THE
COMMITTEE ON SMALL BUSINESS
SUBCOMMITTEE ON GOVERNMENT PROGRAMS AND OVERSIGHT
UNITED STATES HOUSE OF REPRESENTATIVES**

JULY 27, 1999

My name is Jack A. Gullo Jr. I am the Mayor of the Town of New Windsor, Maryland and the owner of a solo law practice in that Town. I am honored to present my testimony to you and hope that the experiences I will relay to you will in some small way assist you in making our country an even better place to live.

I do not represent to you that I possess any special expertise in enforcing and interpreting government regulations, but only wish to convey to you some of the trials and tribulations, and also some of the joys and triumphs, I have had in my business experience and as the leader of my community.

I also want to make it clear that despite the examples I will cite, I do not find fault with the overall goals and purposes of the laws and policies which the regulations are attempting to carry out. It is my intention to emphasize the lack of common sense and practicality which mindless enforcement of regulations can bring.

The first example I would like to cite is the obstacles I encounter during the renovation of my law office. When opening a law practice I decided to locate in my hometown in a building that was a turn-of-the-century carriage house and at one time housed my grandfather's barber shop. An architect/contractor was hired to prepare drawings to address the necessary requirements of the building codes and the American With Disabilities Act (ADA). These plans were approved by all of the necessary agencies prior to the commencement of construction.

I encountered the first roadblock when the plumbing inspector stated that while the bathroom was in conformance with ADA the design of the foyer was not. It should be noted that he is not the inspector who is responsible for ADA review and enforcement. However, the plumbing inspector posted a Stop Work Order and notified the ADA inspector. The ADA inspector indicated that there was indeed a problem with the design of the foyer - too many doors (2 office doors, the outside door, and the bathroom door) opened in to the small area. He stated the design of the ENTIRE building would have to be changed so as to relocate the entrance to the bathroom. Again it should be noted that at this point in the construction the walls had been framed, the plumbing roughed-in, and the plans with all of these improvement had been APPROVED by the building officials INCLUDING the ADA inspector.

With the construction time dragging on it was decided that changes would be made in the design. A pocket door was substituted at the entrance to the bathroom. The cost of this entire door episode: a \$750.00 change order and two weeks of construction time.

The next experience also occurred during the renovation of my office and also dealt with the ADA law. This obstacle centered around the handicap ramp entrance into the building. One side of the building sits at street level, except for the six inch curb and gutter. The regulations and plans called for a ramp to be installed to allow access to the building from the street. It was decided that a concrete ramp would be placed as part of the sidewalk. This was drawn to scale on the approved plans.

Well, the concrete ramp was poured but when the ADA inspector came to approve it he measured that it was .25" from the requirement. What this means is that the ramp, which was to have a slope

of 1" down for every foot of ramp, needed to be 6' long. When constructed it was 5' 11.75" and therefore not in compliance. The result was that the entire ramp, and the adjoining sidewalk, had to be jack-hammered up and a new ramp meeting the exact specifications had to be installed. The cost of this lack of common sense: almost \$1,000 and one month of construction time.

As the Mayor of the Town of New Windsor I also have had a few experiences that may prove interesting. The first deals with a community pizza restaurant. This pizza place in an old historic building, situated on the corner of a main street, with several steps from street level to the entrance. When renovations were being done, the ADA requirement for a handicap ramp was examined. Due to the building being situated on a corner with no front setback, except for the public sidewalk, the building officials waived the requirement for a handicap ramp. They noted that it was impossible to construct a ramp that would allow access yet not pose a safety issue for the pedestrians on the sidewalk and obstruct the view of the vehicular traffic at the intersection. This is where the common sense stopped. Although a waiver was obtained for the ramp, the owner was still required to construct two (2) fully handicapped accessible bathrooms - in a building to which handicap access was acknowledged by the building officials to be impossible. Besides the cost of the construction of these two bathrooms, significant floor space, which is heart of a restaurant business, was lost due to the mandated size of a handicapped bathroom.

Finally, let me share with you a triumph where common sense did prevail over a strict interpretation of an ADA regulation. The Town of New Windsor has its office and held its meetings in the second floor of the Town Hall Building. This has been the Town Hall since the early 1900's. The first floor of the Town Hall Building is occupied by the offices of the local fire department and attached to this building is the engine bay where the fire apparatus is parked and fire company's social hall.

In addressing the ADA needs of the Town Hall it was suggested by building officials that an elevator be installed, at an estimated cost of \$100,000, so that residents could access the second floor of the Town Hall. While public access to the meetings of our Town is the most important aspect of government, the cost of the installation of an elevator was extremely prohibitive. To give some perspective, our annual operating budget is approximately \$275,000. Luckily a common sense solution was adopted. It was decided, in cooperation with the fire company, that all town meetings would be held in the social hall of the fire department. This met the goals of the ADA law and saved the Town the installation and maintenance cost of an elevator.

The common theme in my examples focuses on the rigid enforcement of regulations without a thought to practical solutions to effect the same goals but with more minimal costs. In all of these experiences I have found that it is the people interpreting the regulation that makes all of the difference. The mindless reliance on the black and white words of government regulation out with a common sense approach have cost me money and time, the owner of the local pizza parlor - space - which is a loss of daily revenue, and almost cost my community 1/3 of their annual tax revenues. Any reform that could take place to put more common sense in the enforcement of these government regulations would definitely have a positive effect in simulating small business and promoting economic development.

TESTIMONY OF
MICHAEL T. ROSE
FOR THE
NATIONAL ASSOCIATION OF HOME BUILDERS
BEFORE THE
SUBCOMMITTEE ON GOVERNMENT PROGRAMS AND OVERSIGHT
COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES
JULY 27, 1999

Good morning, Mr. Chairman and members of the Subcommittee, my name is Michael T. Rose. I am the president and founder of the Michael T. Rose companies and served previously as President of the Maryland National Capital Building Industry Association. I am also a member of the Board of Directors of the National Organization on Disabilities and served as Chairman of the President's Advisory Committee on Housing for the Elderly and Handicapped Families for the U.S. Department of Housing and Urban Development (HUD). Thank you for giving me the opportunity to come before you to talk about how some federal regulations are impacting the home building industry.

NAHB and its 197,000 member firms and 8 million employees have long believed that every American should have the opportunity to have a decent home, as part of the American dream. Providing this opportunity is a challenge that home builders accept because we care about housing and we care about the communities where we live and raise our families. But, as one of the most heavily regulated groups in the nation, builders know all too well that burdensome regulations and excessive enforcement policies serve only as barriers to affordable housing.

Today, on behalf of NAHB, I would like to discuss three regulatory issues that have contributed to increased housing costs, making housing less affordable for thousands of American families: Fair Housing Accessibility, Low-Income Housing Tax Credit Audits, and Essential Fish Habitat.

Fair Housing Accessibility

In 1988, Congress enacted the Fair Housing Amendments Act to include "familial status" and "disability" as protected classes under the federal Fair Housing Act.

NAHB supported the amendments believing that *affordable* housing should be accessible to *every* American. And at the time, the cost of compliance was expected to be minimal. In fact,

Senator Tom Harkin (D-IA), in his floor speech referencing the Fair Housing Amendments Act, stated that, and I quote, “the bill only includes minimal low-cost or no-cost features of adaptive design.” Senator Ted Kennedy (D-MA) said that it would cost “twenty-seven dollars for studs in the bathroom, accessible light switches, and widened doorways,” which the senator called “absolutely minimum requirements.”

In reality, however, this has not been the case, and let me tell you why.

When the 1988 amendments were enacted, there was little attention devoted to how the new disability requirements would be implemented.

In 1990, NAHB formed a coalition with the disability community to develop recommendations for HUD’s guidelines on how to implement these new requirements while, at the same time, keeping housing *affordable*. It was a matter of determining which is a bigger barrier to affordable housing: a 6” curb or a \$300 increase in rent – an additional housing cost that *any* American may not be able to afford anyway.

However, HUD rejected the recommendations and took another year before issuing its guidelines, which have been revised since and add costs in the range of \$1,000 to \$3,000, sometimes running as high as \$12,000. And attempts to distribute these guidelines have been minimal, so many builders remain in the dark.

As a result, there is still no clear guidance on how to build units that comply with the law. HUD does not have the authority to review or approve building plans. And while the local building inspector must review the plans, he or she cannot sign off on *federal* requirements. Essentially, builders are left with no place to go to get building plans approved for compliance with the federal accessibility requirements.

Mr. Chairman, it is necessary to understand that builders *rely* on codes. They rely on local building, zoning, and land development codes to determine the requirements that they have to

follow in order to develop land and put up a single-family home or an apartment building. When a builder receives a local building permit, he or she thinks that the building plan complies with *all* of the necessary requirements. Imagine the surprise, then, *years* after the fact, when he or she finds out that the building is *not* in compliance with federal law, specifically the federal Fair Housing Act.

This is what has happened to builders from Idaho to North Carolina. They are being hit with actions from government agencies and private fair housing enforcement groups claiming that the buildings they have built are not in compliance with federal accessibility requirements, even if these builders have done everything they believe they need to do to comply. And, believe it or not, these private enforcement groups are receiving *federal* funding from HUD to bring such actions against builders. In some cases, these groups, such as the one in Idaho, do not even have a disabled person among them. They simply get paid for finding buildings that are not in compliance with the law. In fact, in fiscal year 1999, the Fair Housing Initiatives Program, which literally *funds* organizations to "crack down on housing discrimination," received \$15 million, \$10.5 million of which HUD granted for enforcement and \$4.5 million of which was granted for education and outreach.

Again, Mr. Chairman, I have to emphasize that builders want to provide housing opportunities for *every* American. But at what cost? As you can see, the costs are tremendous any way you look at it.

Because NAHB believes that Congress did not intend to impose excessive regulation in this area, we would like to work with Congress to develop legislation that would give builders some relief from unreasonable enforcement actions, and we are willing to work with HUD to draft guidelines that make sense. And because the chances of a builder opening up his or her mailbox and finding a letter from the Justice Department is far greater than finding guidance from HUD on how to comply with federal accessibility requirements, we would like to see HUD direct funds

away from enforcement and more toward education, which is woefully inadequate. And finally, we believe that HUD should provide incentives to State and local governments to adopt the federal requirements into their local building codes.

To resolve these problems, we have been working with members in the House and Senate through various means. First, Representative Walter Jones (R-NC) introduced H.R. 2437, which provides a "safe harbor" for developers and owners for certain buildings built in compliance with the applicable local accessibility requirements. Also, we are working in conjunction with congressional appropriators to re-focus HUD's attention on this issue.

Low-Income Housing Tax Credit (LIHTC)

Another example of enforcement policies gone awry is the Internal Revenue Service's (IRS) audits of projects that have been awarded Low-Income Housing Tax Credits (LIHTC) by the States. Unfortunately, I can only tell you what is happening in generalities because, quite honestly, our builders are afraid to tell their stories for fear that some of their other projects may be audited.

The LIHTC program is a cornerstone of revitalization in low-income communities. Congress created the program in 1986 to provide a limited amount of tax credits to each State to help finance the building of affordable housing. In order to be awarded the housing tax credits, developers have to submit to an underwriting process by the State allocating agency at three different times. The three determinations include an assessment of all the sources of financing and the total development costs for the project. This assessment is used by the State to calculate the minimum amount of credits necessary to fill the "funding gap" to make the project financially feasible. Once the State agency issues the final amount of tax credits for a project, the developer sells those credits to investors at a discount to raise the necessary equity funds to build the project.

It is similar to the process that you or I go through to get a mortgage loan to buy a home. We have to submit our credit history, our sources of income, and what the asking price for the house is, etc. Once we are approved for the loan, buy the property, move into the house, and start making payments, the last thing we expect is for our bank to come back to us and say, "Well, actually, we miscalculated the amount we can loan you, so you'll need to come up with the additional funds."

Yet, that is exactly what the IRS is doing in its audits. It is telling developers that the State agency's allocation of tax credits is incorrect, and that it is going to retroactively recalculate and recapture the tax credits without proving that the housing has *not* been occupied by qualified low-income residents or that the costs should *not* have been incurred. And these are funds that go to the Treasury, *not* back into the housing program for the State to reallocate.

The IRS does not think that certain portions of the developer and professional fees should be considered "eligible" for tax credit equity financing. Yet, this has not been the practice in the affordable housing industry, and, if true, would not produce enough credit equity funds to finance the building of most projects. By excluding portions of developer and professional fees, the IRS is creating instability and uncertainty about tax credit allocations.

But if it is to continue to work, the LIHTC program must have certainty in its determinations. Without reliable allocations, the ability to plan for the development of housing with private financing is undermined. After all, private capital and capital markets are very sensitive to risks and potential risks. If the threat of an IRS audit and recapture of tax credits is looming over investors' heads, you can bet that they will either flee the market or lower the price they pay for the credits to cover the increased risks. Either way, it amounts to increased costs for the developer and less affordable housing.

So, NAHB would like to work with Congress to develop a legislative proposal that does the following three things: 1) increases certainty for determining eligible basis and credit allocations, 2) protects existing credit allocations, and 3) provides finality for future credit allocations.

Essential Fish Habitat

And finally, Mr. Chairman. I would like to discuss the impact of a new federal regulation, Essential Fish Habitat (EFH), that gives the federal government an unprecedented level of control over land use and private property decision-making.

In the 1996 reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act – a law designed primarily to manage and regulate *marine fisheries* by the Department of Commerce – Congress created an Essential Fish Habitat regulation based on the “critical habitat” model found in the Endangered Species Act (ESA). The intent of this new regulation was to “minimize adverse effects on habitat due to fishing.”

However, the National Marine Fisheries Service (NMFS) is interpreting this mandate to extend its reach into non-fishing activities, such as land development, forest practices, mining, water supply, and agriculture. It is proposing something similar to ESA’s critical habitat that would cover *all* fish, including fish that are *not* endangered or threatened. In fact, in NMFS’ first attempt to map EFH, it defined EFH so broadly as to include *entire* watersheds – more than half of Washington and Oregon, and more than a third of California.

So for example, a builder in Washington, who wanted to get a Section 404 wetlands permit from the Corps of Engineers, would have to wait for the Corps to consult with NMFS and determine if a project will impact EFH before getting the permit. If NMFS believes the project would harm EFH, NMFS will recommend that the Corps of Engineers approve the permit on the condition that the builder modifies the project to include the conservation recommendations. This includes any

development project that requires *any* federal permit, funding, or approval and is within a designated habitat of an "essential" fish species.

And keep in mind, these are not restrictions for species in danger of extinction. They are restrictions to protect the habitat of *all* fished species, no matter how abundant.

As you can see, the permit processing timeline would get more lengthy, especially if a builder has to get a biological consultant for the larger projects within EFH.

If all this sounds familiar...it should. This is exactly how critical habitat is regulated under ESA. Although the EFH has not gone into effect, we can use ESA as our model of what this type of regulation could look like down the road.

Already under ESA, a builder has to jump through any number of hoops to get a permit to develop land. In the Seattle Metropolitan area, for example, the Fish and Wildlife Service (FWS) listed 8 salmon species as endangered, just this past spring. This has the potential of shutting down this area. And I am not talking about just home building, I am also talking about specific activities that will affect the economic well-being of Washington, such as timber harvesting, commercial fishing, tourism, and any activity that may be related to the critical habitat of these salmon.

So, in addition to the cumbersome ESA or wetlands consultation, a builder would have to endure *another*, more important, *duplicative* process. What makes matters worse is that NMFS may not even have the statutory authority to create most of this program. This is excessive regulation.

And what will be the result of longer permitting processes, more stringent reviews, greater prohibitions on where we can develop, and increased mitigation? Higher housing costs. Because ultimately, these regulations would require the builder to spend more time and money on complying with a requirement that has already been fulfilled under ESA.

Home builders support reasonable measures to protect natural habitats, Mr. Chairman, but we would like to work with Congress to eliminate the regulation of non-fishing activities under the Magnuson-Stevens Act. Let us bring some balance and common-sense back into the picture.

Again, thank you for inviting me to testify before you today. Home builders just want to build homes and provide affordable housing to Americans, but it is definitely becoming harder and harder to do so when excessive regulations and the threat of enforcement actions prevent us from doing so.

NAHB is grateful for your interest in bringing to light some of these issues. Mr. Chairman, and we value the understanding that you, as a former home builder, have of our industry. We look forward to working with you to create a more balanced approach to the federal regulatory and enforcement processes and thank you for the time you have given us today. I am happy to answer any questions that you may have.

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**Ignoring Congress and Common Sense:
How the Department of Labor and Legal Services Corporation
Regulations Harm Small Business**

**Testimony Before a Hearing of
The Subcommittee on Government Programs and Oversight
of the
U.S. House of Representatives
Committee on Small Business**

Presented By

**Kenneth F. Boehm
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Tuesday, July 27, 1999

**Ignoring Congress and Common Sense:
How the Department of Labor and Legal Services Corporation
Regulations Harm Small Business**

My name is Ken Boehm and I am the Chairman of the National Legal and Policy Center. NLPC is a non-profit group that seeks to promote open, ethical government through research, education and legal action. NLPC is one of three groups which successfully sued in federal court to force the White House's Health Care Task Force to publicly disclose its documents and the identities of its members. Since 1994, NLPC has sponsored the Legal Services Accountability Project to document and expose abuses within the federal legal services program.

**Have Regulatory Agencies Lost Sight
of the Need to be Fair and Use Common Sense?**

All too often, the worst examples of regulatory abuse occur when government programs ignore the Congressional intent regarding laws and promulgate regulations which are both unfair and lacking in common sense. The small business owner confronted with these regulations feels like he or she has been transported to the other side of Alice in Wonderland's looking glass. Nothing is as it should be. In this fantasyland, words are interpreted to mean the exact opposite of their common sense meaning. Worse yet, the small business owner risks losing huge sums of money, if not their small business livelihood, for not complying with the distorted regulatory fiat.

The regulatory abuses I cite include:

- a Department of Labor regulation which makes farmers liable for carpooling accidents of their employees despite a clearly stated Congressional intent that farmers be exempt from liability involving voluntary carpools
- a Legal Services Corporation regulation allowing legal services lawyers to get attorneys fees from the poor and disabled despite a law just passed by Congress disallowing legal services lawyers from charging attorney's fees
- legal services lawyers interpreting a Congressional requirement that otherwise eligible aliens can receive legal assistance when "the alien is present in the United States" to mean when "the alien was present in the United States" with the Legal Services Corporation failing to take any action against activist lawyers who sue farmers using this blatant

misinterpretation of the word "is"

- Legal Services Corporation allowing legal services lawyers to illegally lobby a state legislature even though they are representing no client, a violation of federal law and LSC regulations

**Voluntary Carpooling By Farm Workers:
Congress Exempts From the Requirements of the Migrant and Seasonal
Worker Protection Act But the Department of Labor Ignores Congress**

Government agencies pass regulations in order to carry out the intent of Congress as set forth in the laws authorizing the regulations. At least that's what's supposed to happen.

In the case of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), the Department of Labor used its regulatory power to directly reverse the intent of Congress on the question as to whether voluntary carpooling by farm workers is covered by MSPA's transportation and insurance requirements.

The legislative history of MSPA made clear that voluntary carpooling by farm workers to get to work was not covered by the requirements of the Act:

The Committee intends, however, that voluntary agreements between individual workers for the transportation to and from their place of employment ("carpooling") for which they receive no fee or other benefit from the employer is not within the scope of this section.

House Report No. 97-885 (97th Cong., 2nd Sess.);
1982 U.S. Code Cong. & Ad. News 4547, 4565

Despite the clear intention by Congress that voluntary carpools in which the employer does not contribute should be beyond the scope of MSPA, the Department of Labor used its regulatory authority to extend liability for such carpool arrangements.

The Department of Labor's reasoning was set forth in its Analysis of Comments: Transportation Under MSPA and Carpools:

Under the regulation, carpooling is a voluntary arrangement among workers for transportation to and from work using a worker's own vehicle. The workers may contribute to offset the costs of the transportation to reasonably reflect the actual costs of transportation. Any compensation or other valuable consideration in excess of the actual costs means the transportation provider is considered a farm labor contractor and thereby subject to the registration and transportation requirements of the Act.

The Department of Labor based its Final Rule on the analysis cited above. (Vol 61, Federal Register, p. 24861, May 16, 1996)

Among the comments received by the Department of Labor on its Proposed Rule urged, "that if the driver received no money from the farm labor contractor, agricultural employer or agricultural association, the amount that was received from the passengers should be of no legal consequence."

Of course, these comments were consistent with the House Report language, but they were rejected by the Department of Labor regulators.

This dubious "interpretation" of the law by the Department of Labor can have horrendous consequences for the farmer. A farm worker who charges fellow workers an amount in excess of the actual operating costs of his car becomes a "farm labor contractor" in the eyes of the law. As a result, this fairly innocent action can have a chain reaction of legal consequences:

- the driver becomes an unregistered farm labor contractor
- the driver is transporting workers in violation of the law
- it's likely that the vehicle does not meet all applicable MSPA safety and insurance standards including liability limits in the amount of \$100,000 per seat

The regulation puts farm employers in the position of having to question each of their workers as to how they commute to work, what they pay, and the actual operating costs of each trip. Misrepresentations, intentional or innocent, which lead the farmer to conclude that each commuting farm worker paid just the actual operating costs are irrelevant as to the imposition of legal liability.

As has been pointed out in testimony by a leading California attorney, Carl Borden, before a hearing of the Workforce Protection Subcommittee of the House Education and the Workforce Committee on June 27, 1997:

... under the DOL's approach, a ride provider who receives from his riders even slightly more than his actual costs is a farm labor contractor who must be registered and authorized to perform transportation activity. If, as likely, the ride provider is not registered as a farm labor contractor and is not transportation-authorized, then the DOL can cite the grower for having failed under § 402 of the MSPA (29 USC § 1842) and the corresponding regulation at 29 CFR § 500.71 to take reasonable steps to determine the ride provider is so registered and authorized. Making matters worse, the DOL could assert under its joint-liability rule that the grower is jointly responsible should farm workers be injured in a motor-vehicle accident while riding with the ride provider.

The net result of the Department of Labor's abuse of its regulatory authority in this case is that the will of Congress that voluntary carpooling be exempt from the strict provisions of MSPA was overturned and farmers are exposed to potentially huge liability unless they undertake impractical, burdensome surveys of all of their workers who carpool on a regular basis. And even that will not exempt the farmer from liability if the workers provide incorrect answers to the questions regarding operating costs.

All in all, this is a classic case of how a government department ignores Congress and common sense in a way that harms small business.

**Congress Tells Legal Services Corporation No Attorney's Fees -
Ignoring Congress, LSC Passes a Regulation Charging
Attorneys Fees For the Disabled Poor**

Congress has been attempting to reform the Legal Services Corporation from the very day it was started - 25 years ago today.

All too often, the restrictions and reforms passed by Congress are evaded by activist lawyers who find loopholes in the law allowing them to continued whatever abuse Congress had sought to eliminate. From time to time, the evasion of Congressional restrictions comes not from the activist lawyers but from Legal Services Corporation itself.

The reforms passed by Congress in 1996 were meant to eliminate a wide range of political activities, abusive practices and controversies associated with the legal services programs. Congress banned prisoner litigation, political redistricting cases, most political lobbying, class actions and representation of drug dealers in public housing evictions. Congress also banned the controversial practice of legal services lawyers obtaining attorneys' fees for the cases they undertake with taxpayers' funds.

Among the reasons for this reform was the fact that legal services lawyers salaries were already paid by the taxpayer so the usual rationale for such fees did not exist. Also, Congress did not want legal services lawyers to abuse their discretion in accepting cases which allowed attorney's fees and ignoring the poor whose cases did not allow such fees. Finally, cases allowing for attorney's fees are far more likely to be pursued by private counsel so using tax-funded lawyers in such cases was considered a waste of public funds.

Despite the crystal clear intent of Congress that such attorney's fees be banned for the reasons just cited, the Legal Services Corporation wrote a regulation which ignored the ban and allowed attorney's fees in cases involving the poor and disabled.

Using tortured logic, the LSC board of directors crafted a regulation which allowed attorney's fees to go to legal services programs in a narrow range of cases involving the most helpless of its clients - the disabled poor involved in Social Security

cases.

The intent of Congress that no such fees be charged ended up being thwarted by a regulation which did just the opposite and hurt those with the misfortune to be both poor and disabled.

Fortunately, Congress intervened. At a February 26, 1997 hearing before the House Commerce, Justice, and State, the Judiciary and Related Agencies Subcommittee, Chairman Harold Rogers (R- Kentucky) blasted Legal Services Corporation (LSC) for the attorney's fees regulation.

When LSC Vice Chairman John Erlenborn attempted to defend LSC's regulation allowing the attorney's fees, Chairman Rogers responded with both common sense and bluntness:

It's outrageous that your interpretation would be that minute, considering all the hot water you're in.

The Recorder, March 5, 1997, page 1

When Mr. Erlenborn insisted on defending the controversial regulation, Chairman Rogers spoke for many when he stated:

"You can't seem to help yourself. You do not grasp reality. Some of us are losing patience."

New Jersey Lawyer, March 10, 1997, page 3

In the end, Congress prevailed. LSC changed the regulation so that cases involving the poor and disabled were no longer subject to the illegal attorney's fees being charged by legal services lawyers.

This case is yet another in which a regulator does the exact opposite of what Congress instructs them to do, while hurting the very poor people they are supposed to be helping.

Congress Allows Legal Services to Assist Otherwise Eligible Aliens Only in Cases Where "the Alien is Present in the United States". . .

**. . . Legal Services Lawyers Interpret This to Mean
"Was Present in the United States"**

During the recent impeachment debate, a statement by President Clinton ("it depends on what your definition of 'is' is.") became a classic example of Washington double-speak. In a debate now raging over when legal services lawyers may assist aliens in cases against farmers, the main issue is the meaning of the word "is."

The farm and business communities are interpreting the appropriations law requirement that otherwise eligible aliens may be assisted by legal services lawyers only in cases where "the alien in is present in the United States" while legal services lawyers are interpreting that phrase to mean "was present in the United States" or "is present in Mexico."

The controversy began last year when a candidly shot video showed legal services lawyers from Farm Workers Legal Services of North Carolina on an illegal trip to Mexico to recruit clients to sue North Carolina farmers. The trip was an issue at the LSC appropriations hearing and was criticized in the *Wall Street Journal*. Following an investigation the program was fined \$17,000 but the official LSC rebuke of the trip carefully limited the criticism to assisting those in Mexico who had never been to the United States. LSC subsequently refused to take action on a complaint filed by the National Legal and Policy Center that a legal services lawyer had filed lawsuits on behalf of aliens who were not in the U.S. at the time the lawsuit had been filed but had worked in the U.S. several years prior to the lawsuit.

LSC instead appointed a special commission, with no representation from the farm or small business community, to determine the meaning of the phrase "is present in the United States. In the interim, no action was being taken to stop the improper lawsuits.

Even worse, LSC President John McKay wrote a March 24, 1999 letter arbitrarily stating that LSC would take no action whatsoever against any legal services program that had violated the appropriations law requirement that assistance may only be rendered to an otherwise eligible alien when the alien is present in the United States.

In short, any farmer being sued by legal services representing an alien in a foreign country is out of luck because LSC will refuse to enforce the federal law and its own regulation. Never mind the clear language of the law. Never mind the fact that neither the LSC president nor the LSC board has the legal authority to change appropriations law.

The relevant language is found in Section 504(a)(11) of Public Law 104-134, which is incorporated by reference into the current appropriations for LSC, Public Law 105-277:

Sec. 504

- (a) **None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (which may be referred to in this section as a "recipient"). . .**

. . .
(11) that provides legal assistance for or on behalf of any

alien, unless that alien is present in the United States and is-

- (E) an alien to whom section 305 of the Immigration Reform and Control Act of 1986 (8 U.S.C. 1101 note) applies, but only to the extent that the legal assistance provided is the legal assistance described in such section;

As with the other examples provided, the current controversy illustrates how a small business owner or farmer can be illegally sued by an alien not present in the United States in direct violation of federal appropriations law, LSC regulations and a common sense interpretation of the legal requirement that the phrase "is present in the United States" means "is present in the United States." This travesty of justice occurs because 1) legal services lawyers want to be able to file lawsuits on behalf of aliens living outside the United States and 2) Legal Services Corporation, the only entity with the power to enforce LSC regulations, has officially declared that it will not do so.

The law and Congressional intent are ignored. The small business owner and farmer are hurt with an illegal lawsuit - at taxpayer expense.

**Congress Bans Legal Services Lobbying Without a Client,
Legal Services Lawyers Ignore the Ban, A Business Complains
and LSC Dismisses the Complaint**

**But a Federal Judge Blasts LSC's Dismissal as Having
"No Rational Basis"**

Throughout its 25 year history, the Legal Services Corporation and the hundreds of local programs it funds with tax dollars have repeatedly incited controversy by using funds intended to help the poor to promote a political agenda. One of the most controversial political practices has been lobbying. Congress from the very beginning and up to the reforms of 1996 has sought to limit lobbying.

The problem has been that some of the activist lawyers funded through LSC are determined to pursue lobbying campaigns, especially to promote pro-tax and anti-business legislation.

One common sense reform initiated by Congress is that legal services lawyers may not lobby a legislative body without a poor client. Recognizing that it's easy to find a poor client to promote virtually any political lobbying effort, Congress further required that the requested lobbying must also address the client's specific and distinct legal problems.

During consideration of legislation before the South Carolina legislature, a

legal services attorney lobbied in favor of legislation which would have hurt a number of businesses. RMC, Inc., a financial services business which would have been harmed by the pending legislation, filed a complaint with the Legal Services Corporation alleging that several legal services programs and their lawyers had violated the restriction against lobbying.

LSC dismissed the complaint by RMC, Inc. In its reasoning explaining its dismissal, LSC stated that the legal services lawyer had been properly retained by the client, that the client was not solicited and that appropriate relief entailed contacting the legislature.

The problem with LSC's slipshod handling of the complaint was that the legal services lawyers did not have a client at the time the lobbying was being done. It was found out that the claimed client had not only not asked the legal services lawyer for lobbying but that the claimed client had not even spoken to the lawyer, was not a legal services client at that time and the lobbying did not even mention any specific legal problem of the claimed client. In short, there was no way for either the legal services lawyer or LSC to claim that the lobbying was legal.

U.S. District Court Judge Henry M. Herlong, Jr., who heard the case, stated:

Legal services lawyers are severely restricted in what they can do on behalf of their clients, especially when the activity concerns the political arena. In the instant case, these restrictions were violated. Berkowitz's lobbying of the South Carolina General Assembly transgressed the clear language of federal law and LSC guidelines. There was no rational basis to decide otherwise."

RMC., Inc, et al., v. Legal Services Corporation, 10 F. Supp. 2d 565 (D.S.C. 1998)

As with the restriction against attorney's fees and the restriction against representing non-citizens not in the United States, lawyers willing to evade Congressional restrictions have gotten a helping hand from a regulatory body, LSC, which is willing to ignore Congress.

The common denominator in all the cases cited is that the regulatory process has been used to thwart the will of Congress and, in the process, innocent citizens have been hurt by these abuses.

Thank you for this opportunity to participate in this hearing on this important subject. America's small business owners can be thankful for the leadership of this subcommittee in exposing and eliminating regulatory abuses.



Washington, DC 20515

Testimony of
Alan M. Hantman, AIA
Architect of the Capitol
Before Committee on Small Business
Subcommittee on Government Programs and Oversight
U. S. House of Representatives
July 27, 1999

The Subcommittee has invited my testimony concerning the lowest step of the monumental stairs on the East Front House wing of the U. S. Capitol. In its letter of invitation to me the Subcommittee asserts that this step is "in violation of code requirements" and that this unremediated violation illustrates undesirable or unfair disparate treatment of code violations by the government as compared to violations by a small business.

I am here today simply and solely to present my view as to whether the step in question does indeed constitute a code violation. I express no opinion on the broader subject of federal regulatory burdens on small business, as I have no qualifications to have an informed opinion on that subject.

I would like to begin with general comments on the application of "codes" to the work of this agency as it undertakes projects at the direction of the Congress. By law the Congress

can, of course, impose codes and standards on our work. No specific building code has been legally applied to our projects in light of the practice of the agency to follow appropriate national codes in the construction, reconstruction, and restoration of the property entrusted to our care by law. The Congress has through the Congressional Accountability Act required us to comply with the federal Occupational Safety and Health laws (OSHA) and to the extent OSHA applies a specific code we would be legally bound.

In new construction projects the agency follows the BOCA Building Code as adopted by the District of Columbia although the District Government has no authority under its Home Rule Charter to enforce such code against the Congress. We are informed that the District is currently in the process of transition from the 1990 to the 1996 edition of the BOCA Code, will move to the 1999 edition within two years and thereafter to the International Building Code. We will follow these developments closely. Building codes are evolving documents and incorporate continuous changes that are generally prospective in application. Such building codes are also adopted and enforced locally.

Let me turn now to the brief history of the monumental stair replacement and replication project. This project was undertaken because of the structural failure of the brick foundations and the general wear of the treads after 130 years since their construction in marble in 1863 as part of the Capitol extension designed by Architect of the Capitol Thomas U. Walter. He modeled the design on the existing central monumental stairs built by

Architect of the Capitol Charles Bulfinch in 1823-24.

The project design started in 1994, prior to the Congressional Accountability Act, and was completed in 1996. The project began under the supervision of Architect of the Capitol George M. White and was completed under the supervision of William Ensign, Acting Architect after Mr. White's retirement in late 1995.

This historic project was intended to replicate the historic stairs as Thomas U. Walter had originally designed them but in a more desirable granite material, in keeping with the marble replacement projects that had already been accomplished on the Senate wing and the central monumental stairs of the Capitol. Consequently, treads and risers were replaced in the exact configuration as the original stairs in keeping with the historic preservation objectives of all of those projects.

Most of the lowest riser is 7 inches or less high, except for the portion of the southern and eastern sections where it gradually rises to become 10 inches above the sidewalk grade. This portion is not within the usual direct path of travel.

Although a riser height of greater than 7 inches would violate the BOCA Code in a newly constructed building, it is permitted by BOCA for existing buildings, including historic buildings, or work on existing stairs where such work does not result in a reduction in safety from the previously existing condition. There has been no reduction in safety from the previous condition in this case. BOCA also has long had text permitting the bottom riser

of steps touching a sloping sidewalk to have a variable riser height.

This does not in the least mean that we consider the riser height over 7 inches to be optimal. Although it is not technically a code violation, it is not an optimal condition. My predecessors in fact considered whether it would be feasible to avoid this condition by adjustments to the adjacent hardscape.

The adjacent sidewalk is relatively continuous at 6 inches above street grade, the "street" actually being the East Plaza of the U. S. Capitol. An essential element of the final configuration of street, sidewalk and steps is the introduction of a curb cut for access for the disabled. That cut occurred at the southeast corner of the sidewalk. Access for the disabled was essential at that location because it is a primary photo opportunity for Members and their constituents. To exclude wheelchair access at that point would have violated the American with Disabilities Act in the opinion of our architects. Moreover, the solution of raising the sidewalk grade to eliminate the riser problem was also unacceptable in that it would have resulted in a curb height of 10 inches at the exact point of desired wheelchair access, also reducing safety from the previous condition. The width of the sidewalk was barely sufficient for a standard ADA curb cut at that location.

Another potential solution would have involved raising the grade of the East Plaza, which would have allowed the sidewalk to be raised in turn. The reason the agency rejected the idea at that time was simply that the East Plaza grade and material was to be changed as

part of the future Capitol Visitors Center Project, which at that time was expected to proceed pending approval of the design and funding. The additional significant expense of raising the East Plaza grade that would soon need to be done a second time with the Visitor Center construction was not deemed to be a cost effective approach. (Perhaps the early optimism that the Capitol Visitor Center project would soon go forward appears misplaced in hindsight.) We anticipate that this grade change will be accomplished when the Capitol Visitor Center is approved for construction to begin, and we are working now to be ready for this to begin in 2001 if approved by the Congress.

Accordingly, Mr. Chairman, while the monumental stair condition existing on the House wing of the Capitol would constitute a code violation if the current code existed when the project was designed in 1851 and built in 1863, the replication of this historic condition does not constitute such a violation.

On the other hand, I would like to note that, although I have disavowed any expertise on the main subject of the Subcommittee's inquiry, I do have past experience with local building codes as a consultant and as former Vice President of Rockefeller Center. Local building code officials vary in their interpretations and the rigor of their enforcement actions. In such a highly decentralized regulatory environment there will no doubt be cases where interpretations and enforcement actions are unreasonable and unduly burdensome on private business and citizens.